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THE Weekly Reporter,

APPELLATE HIGH COURT.

CONTAINING

Decisions of the Appellate High Court in all its branches, viz., in Civil, Revenue, and Criminal Cases, as well as in Cases referred by the Mofussil Small Cause Courts; together with Letters in Criminal Cases, and the Civil and Criminal Circular Orders issued by the High Court; also Decisions of H. M.'s Privy Council in cases heard in Appeal from Courts of British India.

BY

D. SUTHERLAND.

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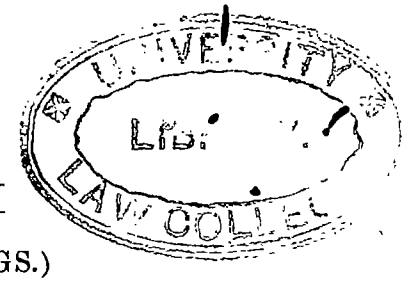
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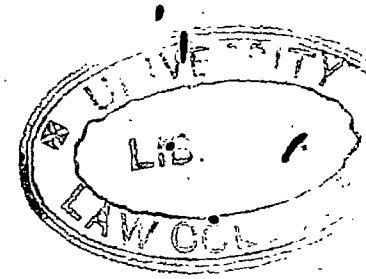
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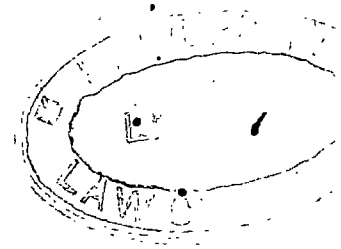
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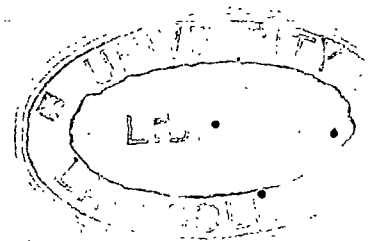


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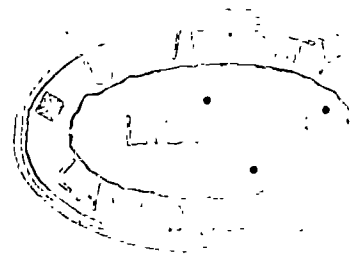
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APPELLATE HIGH COURT.

No. 1.] JANUARY, 1865. [Vol. 2.

The 4th January 1865.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Puisne Judges.*

Default of appearance by Defendant (after filing of evidence by both parties).

Case No. 1898 of 1864.

Special Appeal from a decision passed by Moulvie Nazirooddeen Mahomed, Principal Sudder Ameen of Hooghly, dated the 19*th April* 1864, *affirming a decision passed by Baboo Wooma Churn Mitter, Moonsiff of that District, dated the* 6*th July* 1863.

Anund Chunder Mookerjee (one of the Defendants), *Appellant,*

versus

Digamburee Dassee (Plaintiff), *Respondent.*

Baboo Anund Gopal Paleet for Appellant.

Baboos Mohesh Chunder Chowdhry and *Banee Madhub Banerjee* for Respondent.

After both parties had filed their evidence, the defendant did not appear at the hearing. The first Court decided the suit *ex-parte* under Sections 110 and 111 Act VIII of 1859; and the Lower Appellate Court holding that those Sections did not apply, tried the case on the merits, and affirmed the first Court's decision. HELD that the case fell under Section 147, and that the first Court should have decided the case on the evidence before it, and that the Lower Appellate Court should have remanded the case instead of allowing an illegal judgment to stand and affirming it.

PLAINTIFF sued defendant for the resumption of 4 beeghas of lakheraj land. The defendant appeared pleading limitation and a title to the land as valid lakheraj.

Both parties filed their documents and examined their witnesses; but on the day fixed for the hearing of the case, neither the defendant nor his pleader was present. The Moonsiff, therefore, looking only to the evidence of the plaintiff, and citing Sections 110 and 111 of Act VIII of 1859 as his authority, decided the case *ex-parte*. On appeal by the defendant, the Principal Sudder Ameen, after remarking that Sections 110 and 111 only apply to cases in which the defendant had not appeared at all on the service of summons, proceeded to hear the case on its merits, and affirmed the judgment of the Moonsiff.

Defendant now appeals specially, urging that when the Principal Sudder Ameen had determined that Sections 110 and 111 did not apply to a case of this nature, he should have remitted it to the lower Court to decide the case on its merits, looking to the evidence filed by both parties; and the Court should now remit the case to the Moonsiff for that purpose.

There can be no doubt that, had the decision of the Moonsiff been a real *ex-parte* one under Section 111 of Act VIII of 1859, no appeal would have lain upon the record; but the circumstances were not such as to warrant an *ex-parte* decision by the Moonsiff at all. The case fell under Section 147 of Act VIII; and as the evidence of both parties had been filed, the Moonsiff should have proceeded to look at all the evidence before him, and not to have confined himself to that of the plaintiff alone. As he had committed this error, the Principal Sudder Ameen should have remitted the case to him to pass a legal judgment, and not have allowed an illegal one to stand and to have affirmed it himself.

Sections 351, 352, 353, and 354 afford no warrant for any procedure of this nature.

Under this view, we remit the case to the Court of first instance with directions that, looking to all the evidence on the record, it pass whatever orders seem to it just and proper.

The 5th January 1865.

Present :

The Hon'ble H. V. Bayley and A. G. Macpherson, *Puisne Judges.*

Onus probandi—Allegations of Fraud.

Case No. 2002 of 1864.

Special Appeal from a decision passed by Mr. J. C. Dodgson, Judge of Mymensingh, dated the 20th April 1864, *reversing a decision passed by Moulvie Mahomed Nazim Khan, Principal Sudder Ameen of that District, dated the 29th December* 1863.

Anund Moyee Debia (Plaintiff), *Appellant,*

versus

Shib Dyal Bunwaree (Defendant), *Respondent.*

Baboo Romesh Chunder Mitter for Appellant.

Baboos Grish Chunder Ghose and *Prosunno Coomar Sein* for Respondent.

The plaintiff, suing to recover money voluntarily paid by her to the defendant, alleged that the payment had been obtained by fraud. HELD that the *onus* was on the plaintiff to prove her allegations, and not on the defendant to prove them untrue.

THE plaintiff in this case sued to recover certain sums paid by him to the defendant. She states in her plaint that, after her husband's death, the defendant, who had been acting as his agent, represented that 2,000 Rupees were due to him from her husband's estate on account of articles bought by him for her husband; that 300 Rupees were due to him, being his salary as agent; and that 500 Rupees were required to enable him to carry on a lawsuit for her which was pending. The plaintiff further states in her plaint that she paid the sums asked for, but that she subsequently discovered that all the representations made were false and fraudulently made, and that nothing whatever was due either from herself or from her husband's estate to the defendant: and she denied that any money was required for any lawsuit.

The defendant admitted receipt of the money, and insisted that it was due and properly applied.

The lower Appellate Court decided against the plaintiff, who now appeals specially, urging that the *onus* of proof was wrongly put upon her, and contending that as the defendant admitted receipt of the money, it was for him to discharge himself of it.

We think the lower Court is right, and that before the plaintiff could recover in this suit, it was necessary to prove her case as laid in her plaint. The monies which she seeks to get back were paid by her voluntarily, and under no compulsion to the defendant: her whole case is founded on distinct charges of fraud; and under such circumstances, it is clearly not enough for a plaintiff to say, "you admit receipt of the money, I have no evidence to prove what I have alleged in my plaint, but you must prove that those allegations of mine are untrue."

The appeal is dismissed with costs.

The 6th January 1865.

Present :

The Hon'ble H. V. Bayley and A. G. Macpherson, *Puisne Judges.*

Appelate Court (Decision by—on a different point from first Court.)

Case No. 382 of 1864.

Special Appeal from a decision passed by Moulvie Mahomed Nazim Khan, Principal Sudder Ameen of Mymensing, dated the 5th December 1863, *reversing a decision passed by the Moonsiff of that District, dated the* 18*th March* 1863.

Lukhee Dossee (Plaintiff), *Appellant,*

versus

Mahomed Afzul and others (Defendants), *Respondents.*

Baboo Romesh Chunder Mitter for Appellant.

None for Respondents.

Where the parties themselves, and the first Court have treated a certain question as the most important one in the suit, the Appellate Court should not decide the case on a totally different point, and ignore the original question.

ONE Sreehurry Nundee had four sons—Sibnauth, Bydonauth, Kassinauth, and Juggurnauth. Sreehurry Nundee died, leaving certain property, an eight annas share of which is now in the possession of some of the defendants, who base their title on a purchase (at a sale in execution of a decree) of the right and interest of Kassinauth. All the four sons of Sreehurry are dead.

Sibnauth and Bydonauth having died before the other two. The plaintiffs are the heirs and representatives of Sibnauth and Bydonauth, and they sue to establish their title to one-half of Sreehurry's property, claiming 4 annas through Sibnauth, and 4 annas through Bydonauth. The plaintiffs' case is that, Sreehurry having died *before* any of his sons, the latter became entitled each to a 4 annas share of his property. The defendants who claim under Kassinauth allege that Sreehurry died having made a will whereby he left his property to his four sons, with a proviso that, if any son died childless, then his share should go over to the surviving sons; that Sibnauth and Bydonauth both died childless; and that therefore their shares passed to Kassinauth and Juggurnauth, who so got the whole property between them.

The Court of first instance found the will not proved, and gave a decree in favour of the plaintiffs. On appeal the case originally set up seems to have been lost sight of. It was then contended, and found as a fact by the Court, that Sibnauth and Bydonauth both died before their father, and therefore took no interest in his estate, and consequently that the plaintiffs could claim nothing through them. The existence of a will is not even alluded to in the judgment of the lower Appellate Court. It is found as a fact by both the Courts, and is admitted by the parties, that Sibnauth died in Jeyt 1248, Bydonauth in Srabun 1248, and Sreehurry their father in Maug 1248.

In special appeal it is contended that, as the original defence was founded exclusively on the alleged will of Sreehurry, the Appellate Court was wrong in entertaining an entirely new defence, in which a title independent of the will was for the first time set up. It is also contended that there was in fact no evidence that the father survived his two sons, and that the Court held that he did so through a mistake, and solely because it considered that the three dates given above necessarily and conclusively proved that he did so, whereas (it is urged) those dates proved nothing of the kind, being dates not according to the usual Bengallee year, but according to the Umlee year which prevails in the district where the parties reside and the cause of action arose, and in which year the month of Maug precedes Jeyt and Srabun.

We think that the case must be remanded. There has been an entire departure in the Appellate Court from the issue originally raised, which was whether Sreehurry did or did not make a will. There was no allegation in the first instance that the sons died *before* their father, and the lower Appellate Court is certainly bound, if it decides a case on an entirely new issue, to state why that originally raised is abandoned. It is most unsatisfactory that, in a case like this where the parties themselves, and the Court of first instance, have considered the question of will or no will to be the important question in the suit, the Appellate Court should totally ignore that question, and without giving any reason for so ignoring it, decide the case on a totally different point. Moreover, though some evidence, besides the mere dates, seems to have been given to show that Sreehurry died *before* his sons, we think that under the circumstances it is necessary that the Court should give a distinct finding as to whether the dates admitted were dates according to the Umlee or according to the Bengalee year. If by the latter, the dates which the plaintiffs themselves admitted to be correct put them out of Court at once; but it does not seem probable that they would have launched their suit with a statement of dates, showing on the face of them that they had no cause of action. We observe that the lower Appellate Court speaks of it as the Bengalee year, but this is apparently done incidentally rather than as an absolute finding that it was not Umlee.

The suit is remanded for trial with reference to the above observations.

The 6th January 1865.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Pusine Judges.*

Aquiescence without fraud, no bar.

Case No. 2092 of 1864.

Special Appeal from a decision passed by Mr. F. L. Beaufort, Judge of the 24-*Pergunnahs, dated the* 28*th March* 1864, *reversing a decree of Baboo Koylas Chunder Deb, Principal Sudder Ameen of that District, dated the* 31*st March* 1863.

Bindoo Baseenee Dabea (Defendant), *Appellant,*

versus

Taraprosono Banerjee (Plaintiff), *Respondent.*

Baboo Nobin Kissen Mookerjee for Appellant.

Baboo Sreenauth Doss for Respondent.

A judgment-debtor did not oppose a claim successfully made by a third party to property of the debtor which was seized in execution of decree. HELD that in the absence of fraud in the debtor as against his judgment-creditor, the debtor's not opposing the claim of the third party was no bar to his suing the latter to recover from him the property he had claimed.

IN this case the plea in special appeal is that as the defendant, appellant, obtained the release of the property, on the allegation of his title, in the presence of Bishonath and Ramchunder, judgment-debtors, and without objection on their part, it is not open to plaintiff, who claims through Bishonath, to come in and set aside that which was done by his consent, in fraud of his judgment-creditors. But the defence of special appellant does not allege fraud, but merely acquiescence. Therefore, we cannot consider the ground, now taken in special appeal, as having been urged before the lower Appellate Court. Mere allegation of acquiescence without distinct allegation of fraud, will not bar the plaintiff.

We, accordingly, dismiss this special appeal with costs.

The 6th January 1865.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Puisne Judges.*

Refusal of Court to summon a party as a witness.

Case No. 2077 of 1864.

Special Appeal from a decision passed by Mr. A. Pigou, Judge of Hooghly, dated the 22nd April 1864, *affirming a decision of the Additional Principal Sudder Ameen of that District, dated the 7th August* 1863.

Matungunee Dabea (Plaintiff), *Appellant,*

versus

Kalee Dabea and others (Defendants), *Respondents.*

Mr. M. Stephen and *Baboo Womesh Chunder Banerjee* for Appellant.

Baboo Prosono Coomar Sein for Respondents.

If a party is certified to be a material witness and there is no special reason why he should not be summoned, a Court does not properly or legally exercise the discretion vested in it by SECTION 162 of Act VIII of 1859, in refusing to summon him merely because other material witnesses are relied on or may be called.

THE plaintiff in this suit applied at an early stage of the case to have the defendant Obhoy Churn summoned to give evidence, stating that he was a material witness and knew all the facts of the case. The Court of first instance refused to summon him on the ground that there were other witnesses and that the plaintiff did not specially rely on Obhoy Churn's testimony. On appeal the suit has been dismissed. The plaintiff contended that Obhoy Churn should have been summoned and examined. The lower Appellate Court confirmed the decision of the first Court, not alluding even to the objection as to Obhoy Churn.

The same objection is now repeated before us, and we think it valid. It is clear from the judgment of the Court of first instance that Obhoy Churn's evidence was most material to the case, and as no substantial reason is given or seems to have existed for not summoning him, he certainly should have been summoned. If a party is certified to be a material witness, and there is no special reason why he should not be summoned, it appears to us that a Court does not properly or legally exercise the undoubted discretion which is vested in it by Section 162 of Act VIII of 1859, in refusing to summon him merely because other material witnesses are relied on or may be called. The application made to the Court by the plaintiff was on the face of it quite sufficient to warrant the issue of the summons unless special cause were shown against it, and no such cause seems to have been shown in this case.

The case is remanded for re-trial with reference to the above remarks.

The 5th January 1865.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice,* and C. Steer, *Puisne Judge.*

Joint Property (Gift of)—Consent by one of two brothers (Repudiation of).

Case No. 2295 of 1864.

Special Appeal from a decision passed by Baboo Gobind Chunder Chowdhry Roy Bahadoor, Principal Sudder Ameen of Beerbhoom, dated the 28th June 1864,

reversing a decision passed by the Moonsiff of that District, dated the 30th December 1863.

Mahanund Adhikarree and others, (Plaintiffs), *Appellants*,

versus

Sarodaprosad Chottoraj and others, (Defendants), *Respondents*.

Baboo Opender Chunder Bose for Appellant.

Baboo Khetternath Bose for Respondent.

A verbal consent by one of two brothers to a gift of joint property was repudiated by both jointly, but was proved to the satisfaction of the lower Court. HELD that the brother who did not actually consent, if he contended that he was not bound by the consent, should do so distinctly by alleging that his rights and interests were separate, and not affected by any acts of his brother.

IN this case the plaintiffs sue jointly for possession of certain lands which they alleged to have belonged to their uncle Nobodeeb.

It turns out that the property in dispute was not the property of Nobodeeb, but of Radhamohun from whom it came to his widow Sosee Mookhee and to the plaintiffs jointly.

Seven or eight years ago, at the time of the marriage of a grand-daughter of hers, Sosee Mookhee made a gift of the lands to her grand-daughter, with the consent of Mahanund, as the lower Court finds.

The case of the defendants is that the gift was made with the consent of both the plaintiffs. Both the plaintiffs, join in a special appeal and urge that the "verbal consent of Mahanund cannot be valid and binding as against both the plaintiffs, and that the lower Court was wrong in dismissing the suit."

We think that as this objection has been taken, not by Rakal Singhy, but by the two plaintiffs jointly, and as Rakal did not separately allege, and does not now allege that he was separate and not bound by the consent of his brother, it cannot be allowed.

It is perfectly possible and probable that Mahanund gave his consent as manager and head of the family, and therefore Rakal was bound by it.

If Rakal wished to object, he should have done so expressly and distinctly to the effect that his rights and interests were separate and not liable to be affected by any acts of his brother. But we do not find that any objection was so taken. Both plaintiffs take this objection, as if they were equally entitled to repudiate the *verbal consent* as not being binding upon them.

It is probable that, if Rakal's objection had been taken in the proper mode and brought to the notice of the lower Court, it could have been shown that the consent of both plaintiffs was given. There was certainly evidence to support this plea of the defendants, and the lower Appellate Court in effect finding it to be proved, dismissed the plaintiffs' suit.

Under these circumstances, we see no reason to interfere with the decision of the Principal Sudder Ameen, and we therefore dismiss this appeal with costs, except that the fees of the respondents' pleader must be disallowed inasmuch as he was not present to assist the Court at the hearing of the appeal.

The 6th January 1865.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Puisne Judges.*

Limitation—Pre-emption.

Case No. 2210 of 1864.

Special Appeal from a decision passed by the Principal Sudder Ameen of Sarun, dated the 14th May 1864, reversing a decision of the Moonsiff of Chuprah, dated the 2nd March 1864.

Ghoshain Gobind Pershad (Defendant), *Appellant*,

versus

Bebee Fatima (Plaintiff), *Respondent*.

Baboo Kallee Kissen Sein for Appellant.

Baboo Kissen Succa Mookerjee for Respondent.

The words "taken possession" in Clause 1, Section 1 Act XIV of 1859, mean an actual and not a mere constructive possession; so that a right of pre-emption must be enforced within a year from the purchaser taking manual possession of the property in dispute.

SPECIAL appellant in this case held certain land under a deed of conditional sale. At the end of the term, notice of foreclosure was issued; and the year of grace having expired, the deed of sale was made absolute. A third party was in actual possession of the land under a zur-i-peshgee lease, and special appellant applied to have him ejected on payment of the amount due on his zur-i-peshgee. This application was granted, and the special appellant received possession under this decree on the 10th March 1863.

Special respondent claimed the right of pre-emption. The right was not denied, and

both Courts have found that the usual legal preliminaries have been complied with. But it was urged by the other side that, in accordance with Clause 1 Section 1 Act XIV of 1859, the claim was barred, not having been preferred within one year from the date of the other party's taking possession.

The Moonsiff considered that the special appellant's possession dated from the 23rd of November 1862, the date of expiry of the year of grace. But the Principal Sudder Ameen held that, according to the Section above quoted, actual taking of possession was required, and that, as that did not happen till the 10th of March 1863, the claim was brought within time.

The only point for consideration in special appeal is, what meaning is to be attached to the words "taken possession."

We are of opinion, that these words must be construed literally, and that the meaning of the Section is an actual possession, and not a mere constructive one. The object of the law was to give parties, who had or thought they had a right of pre-emption, due notice of any transfer adverse to their interests, and this could best be known by the fact of the new purchaser taking manual possession of his property. Were constructive possession sufficient, it would be impossible for intending claimants to know of the existence of a right which was inimical to their own.

In the present case we observe that the mortgagee had no possession of any kind till the decree of the 10th of March; a third party being the actual holder of the land, whose title could not be disposed of without payment of the amount advanced under the zur-i-peshgee lease.

We think, therefore, that the Principal Sudder Ameen was right; and that as the first suit was brought within a year from the date of the special appellant's "taking possession" of the property, his claim to pre-emption was brought within time.

The appeal is dismissed with costs.

The 6th January 1865.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and C. Steer, *Puisne Judge.*

Settlement of land—Purchase of Zemindary rights Rights of former proprietors.

Case No. 2279 of 1864.

Special Appeal from a decisson passed by Moulvie Mahomed Nazim Khan Bahadoor, Principal Sudder Ameen of Mymensingh, dated the 3rd June 1864, *reversing a decision of Baboo Nund Coomar Bose, Moonsiff of Bazeepore, dated the 29th August* 1863.

Mahomed Nazir (Plaintiff), *Appellant,*

versus

Zahoor-ul-Huq and others, (Defendants), *Respondents.*

Baboo Anund Chunder Ghosal for Appellant.

None for Respondents.

A revised settlement made with A for himself and as trustee for B does not destroy B's rights in the property. Nor does the subsequent purchase by A of the zemindarry right from the Government destroy the rights of the old proprietors, the purchase being not of the *corpus* of the property, but the purchase of the right to receive the Government Revenue assessed upon the property.

THE plaintiff is a purchaser of the rights and interests of one Khoda Nawaz Khan, and he sues in right of his purchase for a share in a certain resumed property.

It appears that the property was formerly held by Khoda Nawaz Khan, with whom and Angoor Jan Bebee, as the first Court finds, a permanent settlement of the property was made by the revenue authorities subsequent to its resumption by Government. After this settlement was concluded with the above two parties, it appears that, on the representation of Zahoor-ul-Huq, the defendant in this case, a review of the terms of the settlement and a fresh engagement became necessary. Zahoor-ul-Huq representing himself to be a purchaser from Angoor Jan Bebee, and the heir of Khoda Nawaz Khan, got the Collector to make the revised settlement with him; and afterwards when the Government sold its proprietary rights in the property, Zahoor-ul-Huq became the purchaser.

The first Court was of opinion that the revised settlement, effected with Zahoor-ul-Huq did not destroy the rights of Khoda Nawaz Khan in the property; and the purchase by Zahoor-ul-Huq of the zemindaree right from the Government is equally inefficacious as respects the rights of the old proprietors.

The Principal Sudder Ameen reversed this decision, thinking that the revised settlement and subsequent sale extinguished whatever rights Khoda Nawaz Khan might previously have had in the property.

If the facts found by the first Court are correct (and that they are not correct, the

Principal Sudder Ameen does not say), then it is clear that, if Khoda Nawaz Khan was a proprietor when the first permanent settlement was made, he was a proprietor when the revised settlement was made, and had a right to participate in it to the extent of the interest he held in the property. The revised settlement, though made with Zahoor-ul-Huq alone, must therefore be regarded as a settlement made by Zahoor-ul-Huq for himself and as trustee for Khoda Nawaz Khan; and this person or any one representing him has a right to claim from Zahoor-ul-Huq whatever share or interest Khoda Nawaz Khan was entitled to. The subsequent purchase by Zahoor-ul-Huq of the rights of Government does not confer on Zahoor-ul-Huq a right to ignore the previously existing rights of the owners, for the purchase by Zahoor-ul-Huq was not a purchase of the *corpus* of the property, but the purchase of the right to receive the Government revenue assessed upon the property from the proprietors.

In this view of the case, we think the judgment of the Principal Sudder Ameen altogether erroneous; and upon the facts found by the first Court, it is clear he should have upheld the judgment. We accordingly annul the judgment of the Principal Sudder Ameen, and restore the judgment of the first Court, and the special respondent will pay all the costs of suit.

The 6th January 1865.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Puisne Judges.*

Appellate Court (Judgment of)—Sale by Husband to Wife—Mortgage by Wife.

Case No. 1903 of 1864.

Special Appeal from a decision passed by Mr. O. Toogood, Judge of Beerbhoom, dated the 16th April 1864, affirming a decision passed by Baboo Gobind Chunder Chowdhry, Principal Sudder Ameen of that District, dated the 14th September 1863.

Khelluck Chunder Ghose (Defendant), *Appellant,*

versus

Nund Ram Sein and others, (Plaintiffs), and the remaining Defendants, *Respondents.*

Messrs. R. V. Doyne and *R. T. Allan* and *Baboo Rajendro Missre* for Appellant.

Mr. J. Cochrane and *Baboos Dwarkanauth Mitter* and *Kishen Succa Mookerjee* for Respondents.

Both the lower Courts having found that the alleged sale of the property (in the possession of the defendant a mortgagee) to a wife by her husband was not *bonâ fide*, the *bonâ fides* of the mortgage entered into by the wife with the knowledge of her husband became a material issue in the case. The first Court found that it was not a *bonâ fide* transaction, and the Judge concurred in the finding. HELD that the mere expression of concurrence by the Judge (the finding concurred in being supported by no satisfactory reasons) was not sufficient, and that the Judge should have stated the grounds of his agreement.

ONE Radha Gobind, a defendant in this suit and formerly the zemindar of the estate in which the plaintiff's putnee talook is situated, executed on the 28th February 1842 a conveyance of the property to his wife Shiboo Soonduree. She, in 1846, executed a mortgage in English form to Anund Chunder Ghose, the guardian of the then minor Khelluck Chunder Ghose, for the sum of Rupees 10,000, and gave a bond for the amount. Radha Gobind joined in the conveyance disclaiming any property in the estate. In 1847, the mortgagee sued in the Supreme Court for foreclosure, and a receiver was appointed, who, on the 16th May 1849, sold a putnee talook held by one Ram Soondur, bearing a jumma of Rupees 1,046, for arrears of rent, which was purchased benamee by Radha Gobind himself in the name of Sham Loll Kur. In April 1853, Radha Gobind looking upon himself still as Zemindar, notwithstanding the sale to, and mortgage by, his wife in 1842 and 1846 respectively, and considering that the putnee purchased by himself benamee had merged in the superior title, granted a new putnee lease to the plaintiff on a jumma of Rupees 646. The mortgagee, on the 9th December 1853, obtained a decree for foreclosure, and on 7th January 1854, he through the Sheriff obtained possession. In April 1854, the mortgagee in possession petitioned the Collector for the sale of the putnee for arrears, alleging that the jumma was Rupees 1,046. Plaintiff objected, but his objection was disallowed by the Collector. He now brings the present suit for a confirmation of his putnee right.

This case came up to the Court in special appeal, and on the 31st March 1863 the case was remanded to the lower Court with the following observations—"Now it is clear that the title pleaded by the plaintiff is one which Radha Gobind could have created only as proprietor; and if the plaintiffs, hold

ing the putnee *bonâ fide* on payment of consideration, plead and prove that they took their title from a party who was dealing with this and other property claimed by the defendant as proprietor, then the whole of the transactions previous to the creation of the new putnee were not *bonâ fide*. When they show the relationship between the parties, and besides that, a series of evidence showing that Radha Gobind exercised the right of a proprietor, it must be admitted that they had made out a *primâ facie* case sufficient to throw the *onus* upon the defendant to prove that, on the occasion of the transfer by Radha Gobind to his wife, consideration was paid by her, and that, on the occasion of the mortgage, consideration passed from Khelluck to Shibo Soonduree, or, if the passing of the consideration in the first case be not proved, to Radha Gobind, before they can be entitled to question the power of Radha Gobind to create a new putnee." The case was, therefore, remanded to the lower Appellate Court, in order that it might try the case with reference to the above remarks.

On the case going to the Judge, instead of trying it himself, he remitted it to the Court of first instance. The Principal Sudder Ameen laid down two issues: 1st, Had any consideration passed from the wife to the husband at the time of the alleged sale? and 2nd, Had any consideration passed from the mortgagee to Shibo Soonduree at the time of the mortgage? The Principal Sudder Ameen found both these issues in the negative, and decreed plaintiff's suit.

On appeal, the Judge confirmed the first Court's judgment with the following remarks—"The lower Court has found that the further evidence it has taken is not sufficient to prove the issues which have been framed by order of the High Court, and has consequently decreed the case with costs. I concur in this opinion. It has been ruled in the case of Gopee Kishen Gossain, Appellant, *versus* Gunga Pershad Gossain, decided by the Privy Council on the 17th and 18th July 1854, that the criterion in India is to consider from what source the money comes with which the purchase money is paid. In this case, there has been no evidence given that the respondent had any separate property, or that it was from her own funds that the purchase money was paid." The Judge rejected the appeal, affirming the judgment of the lower Court with costs.

The defendant below now appeals specially, urging that the Judge has not given any sufficient answer in his judgment to the second issue laid down by the Principal Sudder Ameen; that the mere statement of concurrence by him in the view of the lower Court is insufficient; and that the case should be remitted for a clear finding on this issue with a statement of the grounds on which the conclusion on which he may arrive rests.

It will be observed that the second issue as laid down by this Court in its order of remand, and that which the Principal Sudder Ameen proposed as the second issue before him, are not exactly the same. But, on consideration, we think that the issues of the Principal Sudder Ameen are correct. If Radha Gobind actually sold *bonâ fide* to his wife the property, then the present suit would be concluded, for plaintiff comes in under Radha Gobind, who on this supposition would have no right to the property. If, however, Radha Gobind's sale be not proved to be *bonâ fidè*, in that case the *bonâ fides* of the mortgage granted by her to the defendant with the knowledge of Radha Gobind, is the main issue in the case.

The lower Courts have found that the alleged sale of the property in the possession of the defendant, mortgagee, to the wife by the husband, is not *bonâ fidè*. The *bonâ fides*, therefore, of the mortgage entered into by the wife with the knowledge of the husband, is a material issue in the case. The Principal Sudder Ameen has found, for reasons given by him which are by no means satisfactory, that it was not a *bonâ fide* transaction, and the Judge has concurred in the same.

Now, this concurrence in an obscure judgment, stated as succinctly as it has been by the Judge, we think altogether insufficient. Passing over the objection that the Principal Sudder Ameen's judgment was passed altogether without jurisdiction, for the remand order of this Court limited the enquires to the lower Appellate Court, and accepting it as a legal judgment, we think that the Judge should have clearly stated the grounds for his agreement with it, and that he has not done so is clear. The remarks cited above refer simply to the first issue; and we gather from the concluding remarks of his judgment that the Judge considers himself precluded from enquiring into the issues as laid down by the Principal Sudder Ameen. But be this as it may, we think that the defendant below is entitled to a clear finding on the issue, whether the mortgage executed in his favor by Shibo Soonduree with the knowledge of her husband, was a *bonâ fide* one or not.

It appears that evidence has been discovered by the defendant since the hearing of the case by the Judge, which may materially affect the conclusion at which the Court arrives. We remit, therefore, the case to the Judge with directions to come to a clear finding on the issue above laid down; and we empower him to receive any fresh evidence, either documentary or oral, which either party may wish to offer in elucidation of their several contentions.

The 7th January 1865.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Puisne Judges.*

Jumma (Fixity of).

Case No. 2223 of 1864.

Special Appeal from a decision passed by Mr. R. C. Rabeholm, Extra-Assistant Commissioner of Maunbhoom, dated the 12th May 1864, *affirming a decision of Baboo Kishenpersad Chowdhry, Moonsiff of Chattah, dated the 17th August* 1863.

Maharajah Nilmonee Singh Deo Bahadoor (Plaintiff), *Appellant,*

versus

Majha Ram Misree and others, (Defendants), *Respondents.*

Mr. R. T. Allan for Appellant.

Baboos Banee Madub Banerjee and *Gobinchunder Mookerjee* for Respondents.

The fixity of the jumma of an ancient tenure is not affected by a different jumma being mentioned in the proclamation of sale of the same tenure.

Both the lower Courts have found that the tenure in the occupation of the special respondent is a brimotur tenure on a quit rent from a period antecedent to 1790 A. D.

The special appellant contends that, as this tenure was advertized for sale with a proclamation showing that the jumma was 8 rupees 10 annas, and purchased after full notice of this being the jumma by the special appellant, it must be presumed that the jumma has been raised since 1790 A. D.

We think that this contention is untenable. It may be that the special respondent has purchased the tenure on better terms than he would have done had the proclamation of sale given a correct account of the jumma payable; but the mere fact of his having made a good bargain does not alter the fixity of the jumma, or make the proclamation, which is no gaurantee of the correctness of its contents, a proof that the jumma is a variable one.

The appeal is dismissed with costs and interest.

The 7th January 1865.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and C. Steer, *Puisne Judge.*

Limitation—Deduction.

Case No. 2360 of 1864.

Special Appeal from a decision passed by Mr. F. J. Cockburn, Judge of Backergunge, dated the 31st May 1864, *affirming a decision of the Principal Sudder Ameen of that District, dated the 9th September* 1863.

Nund Doolal Sirkar and others, (Plaintiffs), *Appellants,*

versus

Dwarkanath Biswas and others (Defendants), *Respondents.*

Baboo Poorno Chunder Mookerjee for Appellants.

None for Respondents.

Deduction of pendency of a former suit from period of limitation can only be claimed, under Section 14 Act XIV of 1859, where the Court before which the former suit was brought had no jurisdiction, and where there has been no adjudication.

This was a suit to set aside a Survey Award, and for possession of certain lands by the plaintiff, the mourooseedar.

It appeared that the Survey Award was dated the 30th July 1859, and the plaintiff instituted his suit in the Court of the Sudder Ameen on the 28th of July 1862.

But the plaint being found to be insufficiently stamped, an order was passed on the 27th of February 1863 that the plaint should be returned.

In fact, however, the plaint was not returned until a month afterwards, namely, on the 31st of March 1863, and the plaintiff filed a fresh plaint on a proper stamp in the Court of the Principal Sudder Ameen on the 2nd of April 1863. The Principal Sudder Ameen dismissed the suit as barred by limitation under Act XIII of 1848.

Two objections are now made before us to show that this decision was erroneous. First, it is argued that the zemindar had appealed to the Superintendent of Survey from the

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decision in the Survey Award, and the plaintiff claimed the time during which such appeal was pending on the ground of the concession made in Section 14 of Act XIV of 1859.

But we think that that Section does not apply at all to such a case.

Even if it could be admitted that the cause of action to the plaintiff, and the cause of the action brought by the plaintiff's zemindar were identical, and that the plaintiff does claim under the zemindar, the other provisoes of the Section are not applicable, inasmuch as there was no want of jurisdiction in the Court before which the zemindar's suit was; and it is only where there is that want, and where there is no adjudication at all, that a party can claim a deduction, from the computation for the purpose of limitation, of the time a former suit was pending.

The Judge further found that the suit in the Sudder Ameen's Court having been instituted only two days before the period of limitation, plaintiff had only two days after the date of the order for the return of the plaint to file a fresh plaint on the proper stamp.

We are of opinion that that decision was perfectly correct, and this appeal must, therefore, be dismissed without costs, no one appearing for the respondents.

The 7th January 1865.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and C. Steer, *Puisne Judge.*

Mahomedan Law—Pre-emption.

Case No. 2370 of 1864.

Special Appeal from a decision passed by Mr. W. Ainslie, Judge of Patna, dated the 1st June 1864, affirming a decision of Moulvie Syud Ali Hyder Khan, Moonsiff of that District, dated the 14th December 1863.

Dulbood Singh and others, (Defendants), *Appellants,*

versus

Mahadeo Dutt and others, (Plaintiffs), *Respondents.*

Mr. G. Gregory and *Baboo Kishen Succa Mookerjee* for Appellants.

Baboo Greesh Chunder Ghose for Respondents.

The right of the first purchaser is simply a vendor's lien, *i. e.*, to retain the property until he has the money from the party claiming pre-emption. It is no part of the Mahomedan law that the claimant of a right of pre-emption must carry the money in his hands and tender it to the first purchaser. A right of pre-emption may be claimed in respect of land within the plaintiff's puttee.

In this appeal two points were taken. It was a suit for pre-emption; and the defendant, who is the special appellant before us, and who was the first purchaser, contended that no tender of the purchase money had been made before the commencement of the suit, either to him or to the original seller.

But, as appears from Macnaghten, page 48, para. 9, the right of the first purchaser is simply a vendor's lien, *viz.*, to retain the property until he has the money from the party claiming pre-emption. That right to retain the property is given by the decree of the first Court.

As regards the non-tender of the money to the seller, we may observe that it is no part of Mahomedan Law that the claimant of a right of pre-emption, as one of the forms to be observed, must carry the money in his hands and tender it to the first purchaser.

The appellant secondly contended that, as the parties are shareholders in ijmalee estate, there was no right of pre-emption by the respondent alone.

But the lower Court has found that the estate was divided into two puttees, and that the land in question is within the puttee of the plaintiff, the party claiming pre-emption. On these grounds the party claiming pre-emption has very properly obtained a decree, and this appeal must, therefore, be dismissed with costs and interest.

The 7th Januarry 1865.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Puisne Judges.*

Possessory action (involving title)—Alluvial lands.

Case No. 2182 of 1864.

Special Appeal from a decision passed by the Judge of the Small Cause Court of Dacca, exercising the powers of a Principal Sudder Ameen, dated the 13th May 1864, modifying a decision of the Moonsiff of that District, dated the 9th January 1863.

Tarenee Pershad Chowdhry (one of the Defendants), *Appellant,*

versus

Sumbhoo Chunder Chowdhry and others, (Plaintiffs), *Respondents.*

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Baboo Otool Chunder Mookerjee for Appellant.

Baboo Annud Gopal Paulit for Respondents.

Suit to recover possession of re-formed chur land The plaintiff claimed the land as a part of his kismut, which kismut the defendant alleged to belong to his ancestral estate. HELD that the question for consideration was not where the land re-formed and who took possession of it, but who was the owner of the kismut.

THIS was a suit by the special respondent (plaintiff in the Court below) to recover possession of certain re-formed chur land, on the allegation that it belonged to Kismut Chundra his property.

It appears from the record that this Kismut was washed away by the River Baraka in the year 1254 B. S., and re-appeared in 1257 B. S. on, as it is alleged, its original site.

In 1260 B. S. it was the subject of a suit under Act IV of 1840, but the Magistrate not being able to decide the question of possession, the land being sandy and uncultivated, attached it, referring the contending parties to a Civil suit.

The special appellant alleges that Kismut Chundra belongs to his ancestral talooks, Nos. 1057, 4742, and 1030 of the Collector's Towjee, and was never at any time in the special respondent's possession.

The Court of first instance dismissed the suit, holding that the plaintiff had proved neither title nor possession.

This decision was modified by the Principal Sudder Ameen, who decreed one plot of land, consisting of 33 beegahs to the special respondent principally on the strength of the Ameen's report, which made out that party to be in possession. He also decreed wasilat from the year 1261 B. S.

It is urged in special appeal:—

1*st*. That as special respondent claimed the land as part of his Kismut Chundra, an assertion distinctly traversed by the special appellant who alleged Kismut Chundra to belong to his ancestral talook, the issue for consideration was not who had been in possession, but who was the real owner of the Kismut Chundra; and,

2*nd*. That as special appellant was not in possession, the land being under the Magistrate's attachment, he could not be made liable for mesne profits.

We think that both these objections must be allowed. The plaintiff came into Court with the distinct allegation that the land he claimed appertained to his Kismut of Chundra, and formed part of his talook Hurree-narayan Chakee. The defendant denied that Kismut Chundra belonged to plaintiff at all, but to his (defendant's) ancestral talook. Clearly then, the point for consideration, was not where the land re-formed and who had taken possession of it on that occasion, but whose property was the Kismut to which the special respondent asserted that the land belonged. This is not a mere possessory action, but one which at first starting involves the consideration of the special respondent's title to the Kismut in question.

The case must be remanded for the Principal Sudder Ameen to decide this issue. Costs will follow the result.

And whatever that result may be, mesne profits cannot be claimed against the loser. The land has been under attachment since its re-formation or at all events since 1260, and at that time it was a mere sand-bank and could have produced nothing at all. Any wasilat that may have been collected since will be in deposit with the Collector of the district, and the party to whom the land may be adjudged can apply to him. This part of the lower Court's order therefore is reversed.

LP 2447

The 7th January 1865.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Puisne Judges.*

Joint Hindoo Family—Inheritance.

Case No. 2225 of 1864.

Special Appeal from a decision passed by Mr. A. A. Swinton, Judge of Tipperah, dated the 20th May 1864, *affirming a decision of Baboo Nobokoomar Banerjee, Officiating Principal Sudder Ameen of that District, dated the 1st December* 1863.

Ramgutty Doss and Poorno Chunder Doss (Defendants), *Appellants,*

versus

Nundo Koomar Doss (Plaintiff), *Respondent.*

Mr. R. T. Allan for Appellants.

Baboo Hem Chunder Banerjee. for Respondent.

Where property is acquired whilst a Hindoo family is joint, according to the Bengal law, the inheritance goes *per capita* and not *per stirpes.*

THIS was a suit by the special respondent (plaintiff in the Court below) to recover possession of his share of the family property, from which he had been dispossessed by the defendants.

The parties are first cousins—Nundo Koomar being the son of Hurree Kishto Bisheshur of Prankisto, and Ramgutty, Ramdhone, and Ramrutton of Radhakishen, three uterine brothers, and they all at one time lived in commensality.

The defence was that the property had been acquired by their own individual exertions, and that the plaintiff had no right to any part of it.

Both lower Courts held that the family was joint and undivided, and that the talooks in dispute were acquired when both parties were living in commensality. They followed therefore the ordinary rule of Hindoo Law, and gave plaintiff a decree for one-third of the ancestral property.

It is contended in special appeal, (1) that assuming as a fact the finding of the Judge, that the property in suit was acquired when the family was joint and undivided, still, as it was obtained by the exertions of the special appellants and not of the special respondent, the division should be *per capita*, and not *per stirpes*, in which case the special respondent's share would be one-fifth instead of one-third; and (2nd) that the case ought to be remanded for the evidence of the Moonsiff, to prove that the special respondent's present case is directly opposed to his statement in a former plaint, and ought therefore to have been at once rejected.

On the first point there can, we think, be no doubt that the Judge was right. He distinctly found that the evidence of respectable witnesses, including the family spiritual guide, proved that the property in suit was acquired whilst the family was joint; it mattered not therefore by whose particular or individual exertions the increase was effected. The nucleus of the property was joint, and the increase was necessarily joint also. This being the case, the ordinary rule of Hindoo Law, applicable to the Bengal provinces, would of course apply, and the inheritance be taken *per stirpes* and not *per capita* (*vide* Macnaghten's Hindoo Law, Chapter II).—Nundocoomar, that is, would take one-third, Bisheshur one-third, and the sons of Radhakisshen (Ramgutty, Ramdhone, and Ramrutton) one-third between them.

The second objection is worth nothing. There is no proof that the special appellant deposited the amount of travelling expenses, &c., necessary for the Moonsiff's appearance; and the Judge has found as a fact that these expenses were not deposited.

We observe, moreover, that neither the Moonsiff nor any one else attached to his Court could possibly have proved the point at issue. The plaint itself was confessedly lost, and how the Moonsiff could be supposed to be able to prove the fact of such a plaint having been preferred, is to us incomprehensible.

We see therefore no reason to interfere with the judgment of the lower Court, and dismiss the special appeal with costs.

The 7th January 1865.

Present:

The Hon'ble F. B Kemp and F. A. Glover, *Puisne Judges.*

Orchard lands (Behar)—Onus probandi.

Case No. 2183 of 1864.

Special Appeal from a decision passed by Mr. W. Ainslie, Judge of Patna, dated the 31st May 1864, reversing a decision of Moulvie Syud Aly Hyder, Sudder Ameen and Moonsiff of that District, dated the 31st March 1864.

Domun Sing and another, (Defendants), *Appellants,*

versus

Sookun Lall (Plaintiff), *Respondent.*

Baboos Opender Chunder Bose and *Romesh Chunder Mitter* for Appellants.

Baboo Kishen Succa Mookerjee for Respondent.

There is no presumption that orchard land in Behar are held on a bhaolee tenure, there being many instances of orchards there held on a nukdee tenure. The onus of proving the special nature of the tenure is on the zemindar suing for the value of trees cut down, and not on the tenant, defendant.

THIS was a suit by a landlord against his tenant, to recover Rupees 143 being a moiety of the value of some trees cut down by the latter. The suit, as laid by the parties, is a simple one, but the litigation has been protracted owing to the mismanagement of the case by the lower Courts.

The Moonsiff, in the first instance, dismissed the suit, holding that the tenure was a nukdee tenure, and that the plaintiff had not proved the existence of any custom, whereby the landlord was entitled to claim any portion of the value of the timber cut down by a tenant occupying a tenure of the above description. The landlord appealed. The late Judge of Patna, Mr. E. F. Lautour, finding that the petition of plaint had been filed by a party who was not the constituted agent of the plaintiff, held that the suit was inad-

missible; but inasmuch as no injustice had been done, and the ryot was the winning party, he contended himself with simply dismissing the appeal. The landlord then applied for a review of judgment, which application was complied with, and the suit remanded to the Moonsiff to take the evidence of respectable disinterested witnesses, and enquire what was the general custom as between landlord and tenant, with reference to the right of either party to cut down the timber and to appropriate the value thereof in whole or in part.

The Moonsiff after the remand found that the tenure of the defendant was not a nukdee one and that the report of the Ameen to that effect was false. The suit of the plaintiff was decreed.

On appeal by the defendant, the tenant, the Judge observes that the Moonsiff had not carried out the order of remand nor enquired into the existence of the custom set up by the landlord. The Judge, however, thought it unnecessary to enquire into the custom, inasmuch as it must be presumed that orchard lands are generally held on a bhaolee tenure, and that the onus of proving that they are not so is on the tenant. The tenant having failed to prove that his tenure was a nukdee one, the appeal was dismissed, and the suit of the plaintiff decreed, the amount claimed being slightly reduced.

In special appeal it is urged:—

1*st*. That the suit of the plaintiff should have been dismissed owing to the informality of the plaint.

2*nd*. That the order of remand was illegal.

3*rd*. That the Judge has thrown the onus on the wrong party.

4*th*. That the Judge has omitted to notice certain documents which prove conclusively that the tenure is a nukdee tenure and not a bhaolee tenure.

5*th*. That the Moonsiff went beyond the order of remand, and was not competent to re-open the question of the character of the tenure.

The plaint as originally laid was certainly informal and ought to have been returned or rejected. Sookun Lall may have been a general agent of the zemindar, but he is not such an agent as is contemplated in Section 17 of the Code of Procedure. The defect was, however, cured by the review application, and the order passed thereon admitting the suit and remanding it for further enquiry.

The second objection is one affecting the procedure of the suit. The Court below ought to have kept the suit on its own file, and directed the Court of first instance to take further evidence and submit its finding; but as no substantial injustice has been done, we think that this is not a ground justifying interference in special appeal.

On the third and fourth points, which for convenience sake we consider together, we think that the Judge was wrong in stating that the general presumption is that orchard lands are held on a bhaolee tenure. Our own experience in the Behar Province is to the contrary, and we have met with many instances of orchards held on a nukdee tenure. The onus of proving that the tenure was of a special nature, that is to say, a tenure paying rent in kind, was on the zemindar, the plaintiff, and not upon the tenant, and the more so as the tenant filed copy of a decision to which the zemindar, the plaintiff, was a party, which shews that in a suit for rent in which the zemindar alleged that this very land was held on a bhaolee tenure, it had been decided that it was held on a nukdee tenure.

On the fifth and last ground, we are of opinion, that the order of remand, passed by Mr. Lautour, has not been carried out. Mr. Lautour's directions were to enquire into the custom alleged by the zemindar, the plaintiff. The Moonsiff, instead of doing this, re-opened the question of the character of the tenure which had already been declared to be a nukdee tenure by the first decision passed by the Moonsiff; in doing this he went wholly beyond the scope of the instructions remanding the case. The present Judge is also clearly wrong in refusing to enquire into the custom on the ground that it must be presumed that all orchard land is held on a bhaolee tenure, and that the onus of proving the contrary is on the ryot.

We should have been glad to have disposed of this case without further remand, but there is not sufficient evidence on the record to enable us to pass a satisfactory judgment, and we are compelled to remand the case to the Judge with instructions that, assuming the tenure to be a nukdee tenure, he will enquire into the custom set up by the plaintiff, to the effect that ryots holding such tenures are not entitled to cut down timber and appropriate the whole value of the same, but that the landlord is entitled to a moiety of the value.

The Judge, after recording evidence and making such further enquiry as may be necessary, will pass a fresh decision taking the case up out of its turn as it is one of long standing.

The Weekly Reporter,

APPELLATE HIGH COURT.

No. 2.] FEBRUARY, 1865. [Vol. II

The 9th January 1865.

Present :

The Hon'ble J. P. Norman, *Officiating Chief Justice*, C. B. Trevor, G. Loch, Shumbhoonath Pundit, and E. P. Levinge, *Judges.*

Rent-free Grants—Validity of grant of lands by zemindar for the purpose of digging a tank where the grantee is bound to distribute water to the tenants of the zemindarry.

Case No. 3288 of 1863.

Special Appeal from a decision passed by Mr. R. Simson, Officiating Judge of Nuddea, dated the 10th August 1863, *affirming a decision passed by the Principal Sudder Ameen of that District, dated the 19th August* 1861.

Peezeerooddeen (Defendant) *Appellant,*

versus

Modhoosoodun Paul Chowdhry (Plaintiff), *Respondent.*

Mr. R. E. Twidale and *Moulvie Syud Murhumut Hossein* for Appellant.

Baboos Dwarkanath Mitter and *Mohendro Lall Shome* for Respondent.

A zemindar, by a sunnud dated in 1830 (after reciting that there was no water in Talook A, and that, the river being at a distance, great inconvenience was felt for want of water, in consequence of which desertions took place in the village) granted to B 22 beegahs of land rent-free, stipulating that B should dig a tank on the land and continue to distribute water. The grantee dug the tank and continued to distribute water. In a suit to annul the grant, on the ground that it was void under Section 10 Regulation XIX of 1793: HELD by the majority of the Court (*dissentient* Levinge *J.*) that grants of land made by zemindars free of rent are void under the provisions of that enactment.

But further held by the majority of the Court (*dissentientibus* Trevor *J.* and Loch *J.*) that the grant in question was valid, the reservation of a right to the use of the water by the tenants of the zemindaree being a benefit or service in the nature of rent reserved to the zemindar; and that the grant was therefore either not one of those intended to be dealt with by Section 10 Regulation XIX of 1793, or was one which the zemindar was empowered to make by Regulation XLIV of 1793.

The Chief Justice.—The plaintiff sues for the resumption of 22 beegahs of land held by the defendant under an alleged rent-free grant. The facts are as follows.

In 1830, Juggomohun Sircar, as Talookdar of 10 annas, and Sreemutty Treepoora Soondaree Dassee, as Talookdar of the remaining six annas of Pergunnah Dogatchia, in Zillah Nuddea, granted to Mahomed Kodrutoollah certain land for the purpose of digging a tank by a sunnud to the following effect:—

"There being no water near village "Juggobundoopore, Turf Dogatchia, in our "Talook Dehee Batye, and the river being "at a great distance, great inconvenience "is felt from want of water, in consequence "of which desertions take place in the "village; therefore, 22 beegahs of unculturable land, lying near the village to its "northward, are hereby granted to you rent-"free for the purpose of digging a tank, and "thereby making provision for water, and "you have of your own accord taken the same. "You will dig a tank in this land, and make "it a reservoir of water. We shall have no "right in the land. Being vested with the "right therein, and bringing it under your "possession and seisin, you will continue to "distribute water. You will stock the tank

" with fish, plant on the raised and low banks " thereof mangoes, &c., and enjoy the same " down to your son's son, and so on, in suc- " cession. No rent shall have to be paid for " the land. Should we or any of our heirs " ever prefer any claim to this, the claim will " be null and void."

The defendant's ancestor dug the tank, and it is not denied that the water has been *distributed* as contemplated by the sunnud: the tank having been always used as a public tank.

The lower Courts having held the grant to be void, the defendant appealed. The case was heard before Mr. Justice Loch and Mr. Justice Glover, who referred the case to a full bench.

The Preamble of Regulation XIX of 1793 is as follows:—" By the ancient law of the country, the ruling power is entitled to a certain proportion of the produce of every beegah of land demandable in money or kind unless it transfers its right thereto, &c., or limits the public demand upon the whole of the lands belonging to an individual, leaving to him to appropriate to his own use the difference between the value of such proportion of the produce and the sum payable to the public, whilst he continues to discharge the latter. As a necessary consequence of this law, if a zemindar made a grant of any part of his lands to be held exempt from the payment of revenue, it was considered void from being an alienation of the dues of the Government without its sanction;" and Section 10 enacts that " all grants for holding land exempt from the payment of revenue that have been made since the 1st December 1790, or that may be hereafter made by any other authority than that of the Governor-General in Council, are declared null and void, and no length of possession shall be hereafter considered to give validity to any such grants either with regard to the property on the soil or the rents of it."

The Preamble of Regulation XLIV of 1793 states that it was to be apprehended that many proprietors from improvidence, &c., might be induced to dispose of dependant Talooks to be held at a reduced jumma, or fix the jumma of the defendant Talooks now existing, &c., at an under-rate, or let lands in farm or grant pottahs for the cultivation of land at a reduced rent for a long time or in perpetuity; that such engagements, if held valid, would leave it in the power of weak, improvident, or ill-disposed proprietors to render their property of little or no value to their heirs, promote vice and injustice, occasion a permanent diminution of the resources of Government arising from the lands in the event of the rent or revenue reserved by such proprietors being insufficient for the discharge of the public demand upon their estates, be an abuse of the great and lasting benefit which has been conferred upon the land-holder by the possession of their lands being secured to them in perpetuity at a fixed assessment, and moreover be repugnant to the ancient and established usages of the country according to which the dues of the Government from the land (defined as in Regulation I of 1793) are inalienable without its express sanction; and by Section 2 (which was afterwards repealed by Section 2 Regulation V of 1812) it is enacted that no leases or other engagements shall be made for a term exceeding ten years.

Reading these Regulations together, it seems to have been the intention of the Legislature to treat the zemindars as agents or trustees for the Government, and, as such, bound to collect the Government share of the produce from each and every beegah of land within their zemindaries. They are incapacitated from depriving themselves of the right and obligation of collecting the revenue, which by Regulation XLIV is declared *inalienable, i e.*, by the zemindar, without the express sanction of Government; and it is in accordance with that principle that all grant by zemindars, which exempt the grantees from liability to pay revenue to the zemindar, are declared null and void by Section 10 Regulation XIX of 1793.

If, therefore, the grant, now before the Court, is to be considered simply as a rent-free grant created by a zemindar since 1790; I should feel bound to agree with the Court below, and say that it is null and void. This would be in accordance with the decisions of the late Sudder Court (Baboo Mode-Narain Singh *versus* Ameerun Nessa Begum, S. D. A. Rep. 1852, p. 967, and Ahmed Ali Khan *versus* Rajah Mode Narain Singh, S. D. A. Rep. 1855, p. 395).

But first, we may observe that, by the acceptance of the grant in question, the grantee and his heirs are bound to allow the tenants of the zemindar in the village to take water; and that liability is one which might be enforced by the zemindar or his successors, owners of the zemindary for the time being, if the grantee failed to continue to distribute water, or, in other words, to allow use of the water in the tank to the tenants of the village.

It is clear that the revenue or rent reserved to the zemindar need not be a

money rent; it may be a portion of the crops in specie, or apparently anything else having a money value. The word "rent" is large enough for that purpose. In Coke upon Littleton 142*a*, Of Rent Service, it is said:—"The rent may as well be in delivery of hens, capons, roses, spurs, bows, &c., or any other profit that lies in render, office, attendance, and such like, as in the payment of money."

The Preamble of Regulation XLIV of 1793 goes on to recite that "it is essential that proprietors of land should have a discretionary power to fix the revenue payable by their dependant talookdars, and to grant leases, *or fix the rents* of their lands for a term sufficient to induce their dependant talookdars, underfarmers, and ryots to extend and improve the cultivation of their lands, and that such engagements should be held inviolable in all cases except where they may interefere with or affect in any shape the primary and indefeasible rights of the Government." Section 8 enacts that nothing in that Regulation shall be taken to prohibit proprietors from granting a lease or pottah for any term, or in perpetuity, for the erection of dwelling houses, or buildings for carrying on manufacture, or for gardens, or for other purposes.

So far from prejudicing the interests of the Government, the grant, by securing water for the use of the inhabitants of the village, appears to have been an essential means of placing the zemindar in a position to realize the Government revenue, and increasing the security of the Government, it was, therefore, clearly not within the mischief intended to be guarded against by the Regulations above referred to, and, therefore, may be said to be out of the purview of the enactment. [See Lord Coke's 2nd Institute, page 886. Comyn's Digest Parliament R. 15, R. 16.]

Again, water may be treated as the produce of the land, a portion of which the zemindar and those authorized by him are entitled to take. And the right to take it may be considered as of the nature of a reservation of rent in kind.

It is satisfactory to me to find that similar grants were held valid by the late Sudder Court in Hureemohun Doss, *versus* Prawn Kissen Raee, S. D. A. Rep. 1847, page 447; in the case of Shaik Kadir, S. D. A. Rep. 1856, page 74; and in that of Lalla Hurreeseekur Shaha, *versus* Sheikh Bukhtear, S. D. A. Rep. 1858, page 968. These decisions appear to be equally consistent with good reason and a sound construction of the Regulations.

I think that the grant was valid, and would reverse the decisions of the Court below with costs and interest.

Mr. Justice Trevor.—The question referred to us for solution is, whether a rent-free grant of land by a zemindar to an undertenant, for the purpose of digging a tank, is legal or not. If it be null and void as against the policy of law, the successor of the grantor will, of course, be at liberty to resume the grant. If it be legal, no such power will belong to him.

The terms of grant in the case before us are as follow:

"To Cazee Koodrutoolla.

This sunnud for digging a tank is executed in the year 1237.

In Mouzah Jugbundpore there is no water, the river is very far, and there is a difficulty in getting water: hence the villagers are absconding; therefore, for the purpose of digging a tank, certain marshy lands, which pay no rent, amounting to 22 beegahs, is granted to you to dig a tank; you also have willingly taken it; you shall dig a tank in the land and procure water. We have no right in the land; you shall hold possession on your own right, and give the water to others as a gift. Throwing fish into the tank and planting trees on the bank thereof, you shall hold possession from generation to generation. No rent for the land will be charged; if I or any of my heirs shall ever make any claim in this matter, it is false. Therefore, this grant for digging a tank is made 14th Maug.

Jugmohun Sircar,
Talookdar."

This instrument is as to its terms a grant in fee simple of 22 beegahs of the grantor's revenue-paying estate to the grantee to be held by him free of revenue for ever; and it can in no way be constructed as a lease, for there is no annual return or rent made by the grantee as tenant either in labor, money, or kind. The condition in the grant, if condition it can be called, of giving water to others, is only a condition subsequent, and there is no contention on the part of the grantor that the grant is liable to be defeated in consequence of a breach of this condition; it is simply contended that the grant itself is of a nature contrary to the public policy, and one that by statute has been declared null and void. Had it been a lease, however small the rent reserved, it would have been legal under the terms of Section 8 of Regula-

tion XLIV of 1793; but as it is a grant involving that which the zemindar had not the power to grant, *viz.*, the Government portion of the produce of the land granted in perpetuity, it is altogether, it seems to me, illegal and contrary to the policy of the law as laid down in Regulation XIX of 1793. By the Common Law of the country, it is laid down in the Preamble of this law, "the "ruling power is entitled to a certain pro- "portion of the produce of every beegah of "land, until it transfers its right thereto "for a term or in perpetuity, or limit the "public demand upon the whole of the lands "belonging to an individual, leaving him to "appropriate to his own use the difference "between the value of such proportion of "the produce, and the sum payable to the "public whilst he continues to discharge "the latter; as a necessary consequence of "this law, if a zemindar made a grant of "any part of his land to be held exempt from "the payment of revenue, it was considered "void, being an alienation of the dues of "Government without its sanction." Section 10 of that law, in furtherance of this view of the Common Law of the country, declares that all grants for holding lands exempt from the payment of revenue made by zemindars since 1st December 1790 are null and void, and no length of possession shall be considered to give validity to any such grant, either with regard to the property in the soil or the rents of it.

The mere fact of the land granted being unculturable at the time the grant was made, does not render that legal which under other circumstances would not be so. The fact of its unculturableness was an accident of the moment; and as the land was portion of the decennially settled estate, the whole area of which forms the security for the Government revenue, it could not be alienated revenue-free without the consent of Government. Neither can the fact of the grant being for the alleged benefit of the villagers, render that legal which is illegal in consequence of its being to the detriment of the interest of the State.

But it may be said that the grant in this case, though against the letter, is not against the spirit of Section 10 of Regulation XIX of 1793, which prohibits only improvident grants, but not those made with a view to the benefit of the estate in which the land granted is situated; and that as the grant in this case is of the latter sort, it does not fall within the prohibition of the law. This position appears to me not to be tenable. The prohibition in the law is absolute and under all circumstances, though doubtless the benefit of the state would a strong ground for inducing Government to consent to the alienation of its portion of the produce of the land, and to legalise the grant.

Coming down to authorities, it appears that the late Sudder Court ruled in 1847, in the case noted in the margin,* which ruling was followed in the subsequent case decided in May 1853, (Decisions for 1853, page 968) that a grant similar to that in the present case was legal under Section 8 Regulation XLIV of 1793. But notwithstanding the marginal note in which the words *grant or lease* occur, and looking to the tenor of the law itself, it is quite clear that that law only referred to leases on which a rent, however small, was reserved, and in no way applies to grants by which the land granted becomes severed from the revenue-paying estate of which it forms a part. With great difference, therefore, to the Judges who passed that decision, it seems to me to be altogether erroneous.

* Hurree Mohun Dass and others, *versus* Prankishen Roy Decisions for 1847, pages 447 and 448.

The view adopted above is in accordance with the judgment passed by the majority of the Judges in the case of Rajah Modnarain Singh *versus* Ahmed Ali Khan;* but the reasoning of the dissentient Judge in this case is so striking at first sight that it requires a short consideration. After other remarks, Mr. Dick proceeds thus—"Grants of the nature in question *quoad* "the grantors and their heirs affect not the "public revenues. They affect merely their "own rental. The grantor continues him- "self to pay the revenues; and if he do not, "the estate is sold, and then the grant becomes "null and void." This is, no doubt, in the main, true; and at the Decennial Settlement, the legislature might, had it chosen, have relied on the Sale Law, to remedy any improvident act done by zemindars, and to restore estates to their original state. But it considered prevention better than cure; and with the former object, keeping in veiw the Common Law of the country, and the probable improvidence and weakness of the zemindars it had then created, it enacted Regulation XIX of 1793, and has thereby declared that all grants of the nature of that before us are null and void, and that no lapse of time shall give them validity. It follows that, as they are null and void in their inception, they can be

* Decisions for 1855 pages 395-399.

resumed even by the grantor or his heirs at pleasure.

I am of opinion, for the reasons above given, that the rent-free grant is illegal and is liable to resumption. The question of assessment is not now before the Court.

Mr. Justice Loch.—The question in this case is, whether a zemindar can alienate any part of his permanently settled estate as rent-free, *i. e.*, can he create a lakheraj title in favor of any person to lands which form part of such an estate?

If a proprietor make such a grant, is it invalid, and can the land be resumed by his successor?

Section 10 Regulation XIX of 1793 distinctly declares that all grants for holding land exempt from the payment of revenue, whether exceeding or under 100 beegahs, made since 1st December 1790, or that may be hereafter made, by any other authority than the Governor-General in Council, are null and void. And the proprietor of the estate, within which such lands were situated, was required to collect the rents and dispossess the grantee of the proprietary right in the land, and re-annex it to the estate.

It is clear from these words that the power of *re-annexing* such lands without application to any Court, was granted to proprietors on the supposition that all lands so separated actually formed part of the permanently settled estate, and were liable with every other beegah of land in the estate for their quota of the Public revenue.

By Section 8, Regulation XLIV of 1793, propreitors of estates were permitted to grant leases or pottahs for any term of years or in perpetuity for the erection of dwelling-houses, manufactories, gardens and other purposes. The above Section, however, is not applicable to the document propounded in this case. It cannot under any circumstances be termed a lease in perpetuity, for it wants the elements of a lease, *viz.*, payment of rent in some shape or other. The deed is a distinct grant to hold 22 beegahs of land rent-free, *i. e.*, lakheraj; and the land is bestowed upon the grantee to enable him to dig a tank for the use of the public. Section 8 Regulation XLIV of 1793, has, therefore, nothing to do with this case.

Another element of confusion must be got rid of, *viz.*, the interpretation put upon the word "revenue" in Regulation XIX of 1793. It has been said that the word is used indiscriminately to mean either revenue or rent according to the context. This appears to be a mistake. The word "revenue" is used in its proper meaning throughout the Regulation, and is not convertible with rent, though it comprises rent. A consideration of the purport of the law will at once show that the legislature was dealing with a question of revenue only. The law first lays down the principle that the Government is entitled to a certain proportion of the produce of each beegah of land, unless it transfers its right either for a term of years or in perpetuity. In regard to all grants made previous to 1765, the Government gave up this right; but in regard to all lands held under grants made intermediately, it declared them liable to assessment, and that Government was entitled to enjoy the revenue so assessed. The Government then appropriated the revenue on lands exceeding one hundred beegahs alienated under any one grant made previous to December 1790, and made over its right to the revenue assessed upon lands under one hundred beegahs to the zemindars within the local limits of whose permanently settled estates such lands were situated. And the law further said that, if any one claim to hold lands exempt from the payment of revenue under a grant made since 1790, his claim was not to be listened to for a moment, for the lands could be no other than a portion of the permanently settled estate within which such lands were situated. And this must be kept in mind that in the limits of an estate there could be only two classes of land, revenue-free created before 1st December 1790, and revenue-paying comprised in the estate at the Permanent Settlement. The word "revenue," therefore, as used in Section 11 of Regulation XIX is used in its proper sense. It was revenue claimable by the Government on lands held on invalid title, which revenue and the right to claim which Government had transferred to the zemindars. When so transferred, the revenue became rent.

It has been asked, why, if a zemindar is able, as unquestionably he is by law, to alienate any part of his estate by sale or gift, he should be unable to create a rent-free tenure? that as he can give a perpetual lease at a quit-rent, there can be no good reason why he should not be able to forego his rent altogether, for if a rent-free grant be said to be injurious to the estate, a perpetual lease on a quit-rent, which the law allows him to make, might be equally injurious.

The reason why such rent-free grants cannot be made, is that they are entirely opposed to the theory of the Permanent Settlement,

and it is very remarkable how guarded the law has been on the subject, for while it allows the zemindar to give a lease in perpetuity, it never sanctions such an alienation as a lakheraj or rent-free grant; and the reason is obvious when the principle of the Permanent Settlement is considered, which is clearly laid down in the Preamble of Regulation XIX of 1793, that "the ruling power is "entitled to a certain proportion of the "produce of every beegah of land demand-"able in money or kind, according to local "custom, unless it transfers its right thereto "for a term or in perpetuity, or limits the "public demand upon the whole of the lands "belonging to an individual, leaving him to "appropriate to his own use the difference "between the value of such proportion of "the produce, and the sum payable to the "public whilst he continues to discharge the "latter. As a necessary consequence of this "law, if a zemindar made a grant of any part "of his lands to be held exempt from the "payment of Government revenue, it was "considered void, from being an alienation "of the dues of Government without its "sanction. Had the validity of such grants "been admitted, it is obvious that the "revenue of Government would have been "liable to gradual diminution." The Preamble then goes on to state that, previous to the accession of the Government to the Dewanny, many such grants had been made, and proceeds to declare what course the Governor-General intended to pursue with regard to these lands.

The passage quoted from the Preamble clearly lays down the principle upon which the revenue was assessed—what part of that revenue was to be considered as rent (*viz.*, the difference between the assets of an estate, and such portion of them as Government might think fit to appropriate)—and it distinctly repudiates the zemindar's right to make a grant exempt from the payment of revenue, such revenue necessarily comprising rent.

Now, it is obvious that, if a zemindar grant lands to any one free of rent, he violates the above principle of the Permanent Settlement, for he not only alienates that portion of the assessment on each beegah of land which the law permits him to appropriate, but he also give up that portion which is the Government revenue, and thereby does a serious injury to the assets of the estate. He relinquishes the quota of the revenue with which each beegah of a permanently settled estate was charged at the time of the settlement; and it is no answer to say that the whole estate is liable for the revenue, for it is not only that the integral estate is liable for the whole revenue assessed upon it, but each beegah of land is responsible for its quota of that revenue. Suppose a zemindar were by successive rent-free grants to alienate the better part of his estate, so that, when it came into the hands of successors, the assets were insufficient to afford the Government revenue. Surely it is not sufficient to say that at any rate the Government revenue is secured from the integral estate, and that a sale for arrears of revenue will put every thing right, the auction-purchaser having the power to set aside all previous engagements. The Government, however, has no wish that an estate should, by the act of any proprietor, be so impoverished as to descend as a burden to his successor, or that the assets of an estate be so reduced by the folly of one zemindar as to render it impossible for his successor to realize the Government dues from the lands, and whose only course under such circumstances is to allow it to go to the hammer. Consequently, the Government have prohibited such rent-free grants altogether.

It is a mistake to suppose that lands alienated by gift or sale, are held exempt from their share of the Government revenue. The proprietor, who has made the alienation, may pay the revenue out of his own pocket; but the untenableness of this supposition would be apparent on the application of any party, entitled to claim a partition, to the Collector to make a partition of the estate. He would proceed to assess every beegah of land, and proportion the Government revenue thereon irrespective of any private arrangements. And so with regard to perpetual leases. On the principal of the Permanent Settlement, it is assumed that the rent received from such lands covers the revenue as well as the zemindar's rent. The zemindar may remit his share of the rent, but he has no authority to remit any portion of the revenue; and therefore a perpetual lease on a quit-rent which does not provide for the full quota of revenue from each beegah of land is as invalid as a rent-free grant.

Looking at the terms of Section 10 Regulation XIX of 1793, and at the principles of the Permanent Settlement, it appears to me that a zemindar has no power to make a lakheraj or rent-free grant, even for public purposes, without the sanction of the Governor-General. If a zemindar wish to make a

grant of the kind, his proper course is to apply to the Government, who alone have it in their power to remit any portion of the revenue assessable on the estate, and to declare any portion of it to be lakheraj, revenue-free as well as rent-free. And it further appears to me that if a proprietor make such a grant, it being declared by the law null and void, his successor may resume and assess it. Under this view of the case, I would confirm the decision of the Judge, and reject the appeal with costs.

Mr. Justice Shumboonath Pundit.—In India, that portion of the produce of lands which goes to the ruling power as its share is called *revenue*, and the produce (in money or kind) received from the cultivators by the persons entitled to collect, as well as the collections made (in kind or money) by other intermediate holders of different grade from those who are above those persons that collect, from the tenants of the lowest grade up to those who pay the revenue directly to Government, is called *rent*. That which persons, collecting from the lowest tenants or others of a higher grade, retain as their profits from collections made by them from intermediate persons, is also called *rent*. The word *revenue*, however, is used indiscriminately for rent as well as for revenue, in many of the old laws preceding as well as many of those passed in 1793; and so in Section 10 of Regulation XIX of 1793 the same confusion in expression is to be found; also in some other laws passed subsequent to 1793 (*See* Regulation III of 1828.)

It is evident from the Preambles of Regulations XIX and XLIV of 1793, that, before and in that year, it was believed to be the custom and the Common Law of the country that each beegah of land was liable to pay its own quota of revenue to the ruling power.

Proceeding upon the principles of this Common Law, with a view to protect the Government revenue due from estates that were, as well as of those that were not, permanently settled, and in order to prevent the zemindars from injuring their solvency to pay the assessment fixed upon their estates by the Decennial Settlement in 1790, it was thought at that time advisable to enact certain rules which were afterwards embodied in the Laws of 1793. By these rules all the British Officers, except the Governor-General, were prohibited from making any rent-free grants; and in estates permanently settled, the zemindars were restricted from settling their lands with any persons under pottahs written according to any form not approved of by the Collector, or for a term exceeding 10 years, except for tanks, houses, gardens, &c. (*See* Section 8 Regulation XLIV of 1793.) The zemindars and all other persons were further prohibited from giving away, without the permission of the Government, any portions of the lands of their estate without reserving some rent, which rent was supposed likely to represent, in part or in whole, according to the quantity of the lands settled by the lease, the revenue due to the Government.

The British Government, on taking the administration of the country, found that, under the system prevailing before, Emperors, Soobadars, Rajahs, holding large landed property, Zemindars, and Talookdars under them, had granted away lands by rent-free sunnuds, the effect of which transfers was to convey such proprietary rights as the party conveying could grant, without reservation of any rent, and which transfers, according to the Common Law of the country, were considered to be alienations of the revenue due to the Government from these lands. Certain officers under the British Government were also from time to time authorised to make such alienations, and many not authorised also made such grants. During the progress of the Decennial Settlement, and in 1793 when the laws of that year were enacted, it was thought to be a sufficient check against acts supposed to be injurious to the public rights, to declare that no grant or alienation should be made rent-free; and it was not considered at all expedient to rule further that the rent reserved in a lease should be equal to the proportionate revenue due to the Government from the lands leased out. It was not an easy matter to fix this proportion; and it was not thought proper to impose such a troublesome condition, because it had already been ruled that the zemindars generally could not settle for more than 10 years, and that fraudulent or wrongful settlements made by them were not binding upon auction-purchasers. In about 20 years, the Government discovered that the imposition of restrictions upon settlement of lands by zemindars, as made by the laws of 1793, was not at all necessary for protecting its rights, and were at the same time highly injurious to the improvement of the country at large. Accordingly, by Regulation V of 1812, power was given to the zemindars to make settlement for any term of years, or even in perpetuity, so far as they could do so. People had already, in one

form or another, adopted long and perpetual leases with or without consideration, revived old and created new tenures of the perpetual kind under different names; and so it was thought advisable, in 1819, when Regulation VIII of that year was passed, to legalize all settlements made in direct opposition to former laws. It was not, however, even at that time, thought advisable to limit the power granted by Regulation V of 1812, by any restriction requiring that, when any estate or part of an estate is let out on lease the rent reserved should not be less than the total or the proportionate share of the Government revenue due from the lands let out.

The former strictness and jealousy by degrees slackened. New ideas came into operation, until in 1859 the present Revenue Sale Law was passed, which materially differs in spirit and principle from the rules adopted in the old laws for protecting the Government rights. In 1859 Limitation was made applicable to suits for resumption of lands alienated *after* 1790, whereby virtually, except as against auction-purchasers, such grants were legalized. If the words of Section 10 Regulation XIX of 1793 are strictly construed, rent-free grants subsequent to 1st December 1790 might be considered resumable even by the persons making such grants; and accordingly it might also be thought to be within the power of their heirs and successors and privies to re-attach the lands to the estates from which they were so alienated. It may appear to be unjust and inequitable that any person should have a right to take advantage of his own wrong, that grants made for consideration should be resumable by the party making the same, and that his heirs should be empowered to question the legality of the act of their predecessors. But perhaps the policy which dictated the laws preferred to protect the rights of the Government without any regard to the hardship or injustice noticed above. The earlier ideas regarding the mode of protecting the rights of the Government, began, however, to change by degrees, till they were materially altered into quite new principles now adopted by the Government upon this subject. While the law regarding the restricted power of the zemindars to make settlements of their lands was by degrees completely modified, the prohibition regarding rent-free grants was not altered by any express enactment. The present Sale Law requires auction-purchasers to respect certain settlements by the defaulter, if the amount of rent and other conditions of the lease were approved by the Collector before the sale. It has also made provision to the effect that in some cases it may, through the Collector, by notification at the time of the sale, require the purchaser to respect all incumbrances created before the sale, just as they are bound to respect leases given by themselves. At present, the Government is willing to sell its rights of receiving the revenue in consideration of a money payment in a lump sum.

If it be now held by my colleagues that by these modifications up to 1819, and in subsequent years, the prohibitory provision of Section 10 Regulation XIX of 1793, so far as it authorises the grantor, his heirs, and privies to resume a rent-free grant made subsequent to 1790, is *virtually* modified without any express enactment to that purpose, I would at once agree in that opinion. I would also agree with my colleagues if they hold that, as regards such grants against those who have in "equity" no rights to resume, by a fiction of law it is to be assumed that the formal sanction of the Government has already been obtained by the grantees. The subjoined extracts from a recent ruling of the Privy Council in the Assessment case of Ranee Surnomoyee, appellant to Her Majesty, to a great extent supports this view.*

* "Upon the argument before their Lordships the Counsel for the respondent relied on the 5th section of Regulation XLIV of the year 1793, which is the earliest of the Regulations on this subject; and they contended that although subsequent Regulations upon the subject have been passed in different languages, and repealed, this 5th Section of Regulation XLIV of 1793 has never been repealed, but was in force at the time when the sale in question was made, and this action was commenced. *Whether upon the true construction of all the Regulations taken together, this particular Section ought to be taken to have been repealed or not*, their Lordships do not think it necessary to determine. They assume in favor of the respondent that that stands unrepealed and in full force, and will deal with the case upon that footing. The language of this Section is no doubt favorable to the respondent's case. It provides that, when a zemindaree is sold at a public sale for discharge of arrears due from the proprietors to the Government, all engagements which such proprietors shall have contracted with dependant talookdars, as also all leases to under farmers and pottahs to ryots, shall *stand cancelled* from the day of sale, and the purchaser shall be at liberty to collect from such talookdars, and from the ryots, whatever the former proprietors would have been entitled to demand according to the established usage and rates of the Pergunnah or district in which the properties lie, had the engagement so cancelled never existed. But the 7th Section of the same Regulation XLIV of 1793 provides that this is not to authorise the assessment of any increase upon the lands of such dependant talookdars as were exempted from increase at the Decennial Settlement of 1793.

Their Lordships do not, upon any evidence in the case on which they think it safe to rely, see their way to the belief that the appellant brings her case within

It is evident that, with regard to alienations since 1790, there was very little pressing necessity to make any law to limit the resuming powers of persons granting such invalid grants or of their heirs. These rent-free grants were very rarely given by the proprietors in consideration of money. These were always pious and religious gifts. It was well known that Hindoos and Mahomedans invariably respect such gifts of their own creation or of their predecessors, and think it a disgrace and *sin* to take away lands given to Brahmins, Saints, and Fakeers, as gifts during religious ceremonies for use and cultivation, or for private houses, tanks, or chards, public temples, or other religious and charitable purposes. Even purchasers by private sales or at auction for revenue, Hindoos as well as Mahomedans, generally respected such grants, until about 30 years ago some Bengalees, having become zemindars by private purchase or by public sales, turned a new leaf, and braving the public opinion of their countrymen, began to exercise resumption rights and so tempted some others to follow their example. With regard to rent-free grants after 1765 up to 1790, out of regard to these time-honored feelings of the people, the Government, by Section 3 Regulation XIX of 1793, provided that grants within 10 beegahs given for charitable and religious purposes under certain circumstances and conditions were not to be resumed. Actions for resumption by landlords were very rare before, and even now all zemindars, &c., do not exercise these rights. The resumption suits are comparatively confined to the districts of Hooghly, Burdwan, and the 24-Pergunnahs. The respect generally shown before, and the disrespect exhibited by some persons since, the new idea has prevailed, related to, and affects, not only the grants subsequent to 1790, but also invalid grants existing before that year. It was within the powers of the zemindars to give or withhold this authority to resume, when they made settlement of their lands with others on a long lease or in perpetuity; and it has been observed that in former times such a power was often withheld even when putnees were granted for a consideration. This state of the feelings of the people shows why there was no pressing necessity to make any law about this matter of resumption. The zemindars and others holding inferior rights, having before 1765, and afterwards, according to the universal custom of the country, granted rent-free tenures, and these grants having been considered to be alienations to the prejudice of the revenue due to the ruling power, the Government thought proper to uphold such

Continuation of Note, page 22.

the 7th Section; but they cite it because it may have a bearing on the construction of the language of the 5th Section. The respondent contends that, by the operation of the words *stand cancelled* from the day of sale, the existing interest of the talookdar *ipso facto* ceased to exist without any act done by the purchaser that it was incapable of confirmation, or being set up by him or his successors; and that where, from the acquiescence of the purchaser or those claiming under him, the possession had remained in the talookdar, and those claiming under him, undisturbed, and the original rent had been received, no matter for how long a period or through whatever number of mesne conveyances, it still remained a bare possession at the will of the zemindar for the time being, and the rent always liable to enhancement. In this hard and literal construction of the words cited above, their Lordships do not concur. They think that their meaning is properly to be collected from the policy and intent of the Regulation, from the language used in other parts of the same Section, and from the 7th Section which creates an exception out of the provisions of that Section. English lawyers are familiar with this principle of construction applied as early as the time of Lord Coke (*See* 1st Instt. 45) to the disabling Statute of 1, Eliz. Cap. XIX Section 5, and in several modern reported cases between landlord and tenant on clauses of forfeiture in leases. Words which make a Bishop's grant utterly void and of no effect to all intents, constructions, and purposes have been held not to prevent the grant from being good and binding on the grantor, and in some cases confirmable by the successor; and so a proviso in a lease, that it should be void altogether in case the tenant should neglect to do a certain act, has been held only to make it voidable at the option of the landlord. Their Lordships do not cite these as authorities governing this case, but mention them only as illustrating a general principle of construction, which, for its justice, reasonableness, and convenience, must be considered of universal application. In the present case, the object of the Government was that the jumma should be duly paid, and that the means of paying it should not be withdrawn by the improvident grants of the zemindars who had made default. But cases of default might often arise where no improvident grant had been made, where the talookdars and ryots held at proper rents, and the default was owing to extravagance, mismanagement, or other causes. In such cases Government cannot be supposed to have intended a wanton and unjust disturbance of vested interests. It is true that the Section makes no distinction in terms between the two classes of cases, and it would be unsafe in construction to make any such; but the consideration furnishes reason for such limitation, both as to time and extent of operation as the words will admit, indeed seem to require, in order to give effect to the whole sentence. Now looking at what follows in the same Clause, it is obvious that no such absolute cancellation was intended, for the power expressly and affirmatively given to the purchaser supposes the talookdars and ryots to remain in all respects as before, except that they become liable to a certain limited increase of rent "according to the established usages and rates of the Pergunnah or District," words in themselves showing that the Section was directed to cases in which grants had been made with reservation of rent below those usages and rates. It is to be observed also that, in terms, this power is given only to the purchaser himself, which would ordinarily suffice to remedy the mischief in contemplation. The language of the exception too in Section 7 shows that what was aimed at by Section 5 was not the destruction of tenure, but the increase of rent, "under certain specified and equitable limitations."

grants created previous to 1765. It kept the lands covered by grants from that time up to 1790, apart from the estates of which the Decennial Settlement was made, and from time to time made rules, before and in 1793, and after that time, for assessing such rent-free lands. Meanwhile, in estates permanently settled, parcels less than 100 beegahs were (by Section 6, Regulation XIX of 1793) made over to zemindars without any additional revenue being imposed upon them for the same.

Looking to what had been done before, the Government was naturally afraid that the proprietors of permanently settled estate might again do what others, with less power, had done before; and so after a long period the Government might be required upon some grounds of expediency or hardship to uphold these new grants, just as it was compelled to hold good the grants made before 1765; and to make rules for assessing some of the grants from that year to 1790, with only the half-jumma, just as it was afterwards in 1809 compelled to uphold indirectly and partially in estates no longer in its possession, against the present holders of these estates, grants created *after* 1790, by applying rules of limitation to suits for possession and assessment of these grants. All lands not having been settled permanently in 1790 into estates, several zemindarees remained in the *khas* possession of the Government for a long time, and even now some lands are lying in the hands of the Government, which are not settled at all with any person as estates.

It was apprehended that the revenue officers may create rent-free grants in properties thus held *khas* by the Government. In order to avoid this contingency of which the Government was so much afraid, it thought proper to rule that all rent-free grants without its permission given after 1790, were null and void, and no length of possession was at any time likely to give any validity to these alienations. The object was much *less* to assist the zemindars in 1790 or 1793, or immediately afterwards, than to provide against the possibility of any claim of prescription being raised by any person with reference to possession under any such rent-free grants of the 1st of December 1790, as regards the revenue due to the Government from these lands.

It was on these grounds that I, sitting with the Chief Justice in another case tried before another full Bench of five Judges, (but in which after all no decision was pronounced) was inclined to hold that a zemindar creating or those holding under one who has created any such grant, were not authorized to resume, on the ground that what he or his predecessors had done was illegal under Section 10 of Regulation XIX of 1793. If the original prohibition was based on a common law of the country, it was equally a well known common custom, that any such grant is not ordinarily considered resumable by those who may have made it, as well as by those who hold under him. The laws in 1793 represented not only the ideas then entertained by the Government; but these laws, as well as those subsequently passed, also took cognizance of the well known religious and social opinions and general conduct of the people of the country.

In this view of the case, it may perhaps be proper to uphold such grants with a declaration that they are not binding against the Government or those entitled to hold *under* it, by right of an auction-purchase. When in 1859 the Government distinctly declared that an action for assessment, and also for possession could be brought regarding rent-free grants made after 1790, I cannot decide that in such cases, the right of those who are not auction-purchasers, is only to see the tenure *assessed* with a rent to the extent representating its portion of the Government revenue and not to *dispossess*. For the purposes of this case, it is sufficient to notice that, when rules were made by the Government to protect revenue from all lands settled in an estate, it never proceeded to the extreme length of prohibiting the zemindars from digging tanks and wells building houses for religious worship or for dwelling purposes, or planting orchards upon certain parts of their estates for private or for public use, and thus deprive themselves of all chance of getting any rent or produce in kind from these lands. In all laws regarding sales for revenue, provision however was made for certain reasonable rents being payable to the auction-purchaser for lands so used by the defaulter. It does not, however, appear that any assessment could be made regarding lands upon which something was built or done, which was not likely to yield directly any return to the auction-purchaser, but at the same time was enjoyed by the public, and was not in the exclusive possession of any particular person.

As regards others than the auction-purchaser, the use thus made of these lands, at least when made for public purposes, was in one sense no better than a rent-free alienation: and yet the heirs or representatives of

those who may have made such transfers, have not been considered to possess any power to assess the lands so alienated from the assets of the estate.

The power to grant a russudee lease for the reclamation and cultivation of waste lands, beginning with a rent-free term for certain years and a progressive rent afterwards, was, of course, never questioned, and is not within the prohibitions of Section 10 of Regulation XIX of 1793. It does not also appear that the object of this Section was to prevent any lands being given away rent-free for any use beneficial to the estate, or likely to promote cultivation, or to increase the produce as well as the value of the lands of the estate. If lands were given away rent-free for public purposes—as in this case, for digging a tank in a village for procuring water for raising or protecting the crops upon the lands of that village, to a person who may be willing to incur the expenses of the digging, but who nevertheless might not find it convenient to pay any rents for lands, which he never intended to use as private property—it does not follow that such a grant was contemplated to be included within the alienations which the law had declared to be null and void. The letter of the law may cover such a case, but the object of the law was, and the subsequent modifications are, quite opposed to any such construction.

I do not think that it is stretching the words of the law beyond the legal limits allowed, or that it is opposed to the present state of the law to decide that the grant of a portion of lands for any public purpose likely to improve the value of the estate, is not null and void, though made rent-free and without the formal sanction of the Government. I am not, however, prepared to state that a rent-free grant for tanks comes within the powers given to the zemindars by Section 8 Regulation XLIV of 1793, as was held repeatedly by several Judges of the late Sudder Court. This Section refers to *leases* for rents, and not to grants without any reservation of rents.

On these grounds, I hold that the grant in this particular case is not resumable by the plaintiff. I would, therefore, decree the appeal, and reverse the decision of the lower Appellate Court.

Mr. Justice Levinge.—The plaintiff, as proprietor of 3 annas and putneedar of the remaining 13 annas of the estate referred to in the plaint, sued the defendant to resume 22 beegahs of land held by him as rent-free under a grant made since the Permanent Settlement by a former zemindar in 1237.

The following is a translation of the grant:—

"This indenture of grant (sunnud) of land for the excavation of tank is executed in the year 1237 to the effect following—

"There is no water near village Juggobundhunpore, in Turuff Doogatchee, within our talooka 'Dehee Betyesea,' the river being at a great distance, the village is about to be deserted for want of water; therefore, 22 beegahs of unculturable *dobha* or low land lying contiguous to the village towards the north-west situate, &c., are hereby granted to you rent-free for the purpose of excavating tank and providing water. We shall have no right to the land being vested with the right therein, and bringing the land under your possession and seizing; you will continue to supply the public with water and so forth.

"Stocking the tank with fish, and planting bamboos, mangoe, and jack fruit trees on the banks and appendages of the tank, you will continue to enjoy the same down to your son, son's son, in succession. You shall not have to pay any rent for the land. Should we, or our heirs, ever prefer any claim to the same, it shall be null and void. To this purport we grant this indenture of sunnud for excavation of Tank."

The substance of the defence was that, as the land had been granted for a tank which was made for the benefit of the public, the plaintiff was barred from resuming the subject of the grant, and further, that the representative of the zemindar had no power to set aside a grant or gift made by his predecessor.

Both the lower Courts decreed in favor of the plaintiff; and the case coming up to this Court on special appeal preferred by the defendant, the Bench, after hearing arguments on both sides, and the Regulations and authorities cited and discussed, submitted the consideration of this appeal to a full Bench.

The appellant's pleader has contended that the grantor had a legal power to make this grant, and drew a distinction between a grant of land rent-free and revenue-free, and contended that a grant worded as the one before the Court was not null and void under the provisions of Regulation XIX of 1793, Section 10.

It was not pressed in argument that this grant came expressly within the terms of Section 8 Regulation XLIV of 1793 which

recognises the power of the zemindar to grant a lease or pottah for years or in perpetuity for the purposes of a tank, although the decision of 18th August 1847, reported in the Sudder Decisions for that year, page 447, was quoted to show that a grant of land rent-free for such a purpose was held by the Court to be within the class of grants stated in that Section. But it appears to me that this grant does not come within the category of grants expressly declared to be within the power of a proprietor to make by Section 8 of Regulation XLIV of 1793, inasmuch as this grant is not a lease or pottah—a distinction which does not appear to have struck the Court in the case above cited, when they ruled that the grant rent-free proved in that case, came within the terms of that Section. On the other hand, I do not consider that the grant now before the Court falls within the class of grants prohibited by Section 10 of Regulation XIX of 1793. The grants there contemplated do not appear to me to include or embrace gifts of land for the purpose of making a tank, even supposing that the term "rent-free" in a grant may be properly construed by this Court as meaning "revenue-free." Supposing that the provisions of that Section aimed at protecting the income of the zemindar by preventing its diminution by grants of portions of the estate rent-free, as well as declaring that all grants made in derogation of the public revenue are null and void; still I think the object and language of this deed clearly shews that there was no other intention than to benefit the public, and the parent estate at the expense and labor of the grantee, and that the grant can have no other effect; and I should require to be shown the clearest declaration of the law, before I would hold this grant to be null and void.

Besides, I would remark that the language of that Section does not seem strictly applicable to the grant before the Court, inasmuch as the Section declares "that "the proprietor is authorized and required "to collect the rents from *such land* grant-"ed at the rates of the pergunnah, and to "dispossess the grantee of the proprietary "rights in the land"—words hardly referable to a *bonâ fide* gift of land for the purpose of excavating a tank for the supply of water to prevent the villages of the zemindaree being deserted, and which was to be made and maintained at the expense of the grantee.

For the above reasons I would uphold this grant, and abstain from expressing any opinion on the abstract question, whether a grant by a zemindar of a portion of his proprietary rights in his estate rent-free is a grant wholly void as against the grantor, his heirs, and those claiming under him.

But as the Court at large are for going into that matter and expressing an opinion, I do not shrink from stating my views.

I shall first consider the scope of Regulation XIX of 1793, and then allude to the 10th Section on which so much stress is laid and under which, it is said, this grant is null and void.

Regulation XIX is declared by the printed Title to be a Regulation for re-enacting with modification the rules for trying the validity of titles of persons holding lands exempted from the payment of *Revenue to Government.* The concluding part of the 1st Section—"upon the above grounds, and with a "view to facilitate the recovery of the pub-"lic dues from land held exempt, &c."—shows that the whole aim of the Regulation is to secure the recovery of the dues of Government, and that it is not a Regulation passed to prevent a zemindar, as long as the land is not illegally granted free of those dues, from granting a portion of his zemindaree free of rent payable to himself or his heirs or assigns.

The 15th Section provides for suits, and declares that the collectors of the Revenue are to defend all suits that may be instituted against Government by any person claiming a right to *hold lands exempt* from the payment of the *Public Revenue.*

The 24th Section provides for the Registry. It declares that all persons, actually holding lands exempt from the payment of *Public Revenue* in virtue of grants made previous to 1st December 1790, are allowed a fixed time to register in the office of the Collector of Revenue; showing plainly, I think, all through the Regulation, that it was introduced in 1793 to protect the public revenue, facilitate its collection, and effectually put an end to any pretence that lands could be held under grants made after 1790 free from the payment of revenue to the Government; in other words, it is publicly notified that *lakheraj* holdings could not be created for derogation of the fiscal prerogatives of the Government. I take it that the grant now before the Court or any grant using simply the terms "free of rent payable to the zemindar, his heirs, or assigns," would not be termed a lakheraj according to Wilson's Glossary, *i. e.*, a term "applied to land exempted for some particular reason from paying any part

of the produce *to the State*:" and Mr. Tucker in the S. D. of 28th January 1840, Select Reports, vol. 6, p. 282 thus defines it—"The "tank has been improperly termed lakheraj. "It is not lakheraj, for it has not been exempt-"ed as such from the general estate for "which the zemindar pays revenue to Govern-"ment."

The 27th Section of Regulation XIX enacts that all grants not registered within the prescribed time are declared invalid *as far as regards the exemption from the payment of revenue*, and the land shall be assessed with *revenue*, as directed by Section XXVI; and that Section leaves that duty to the Collector, who, I am not aware, had any power to assess the amount of rent payable to the zemindar.

The 28th Section informs the public of the effect of registry, and states that it is not to prevent the proprietor suing to recover possession of the soil, and the Collector suing to recover the *revenue*.

I therefore think that the language of the 10th Section—"all grants for holding land "exempt from the payment of *revenue*, whe-"ther exceeding or under 100 beegahs of land "that have been made since 1790, or that may "be hereafter made by any other authority "than that of the Governor-General in Coun-"cil are declared *null and void*"—does not apply to a grant of land "*free of rent*;" and to read or construe the deed by the language of the 10th Section is to interpolate another expression, extend its operation, make it express what it never intended, and nullify and avoid the deed made for good consideration.

And here I cannot avoid quoting a familiar passage from Broome's Legal Maxims, where the construction of deeds is discussed, and supported by so many authorities (*See* pages 482, 485)—

"The construction, likewise, must be such "as will preserve rather than destroy; it "must also be favorable and as near the "minds and apparent intents of the "parties as the rules of law will admit; "and, as observed by Lord Hale, Judges "ought to be subtle to invent reasons and "means to make acts effectual according to "the intent of the parties. They will not, "therefore, cavil about the propriety of "words when the intent of the parties "appear; but will rather apply the words "to fulfil the intent than destroy the intent "by reason of the insufficiency of the words." Again—"If words have a double intend-"ment and the one standeth *with law*, "and the other is *against law*, they are to "be taken in the sense agreeable to law"—a passage peculiarly applicable to the term "rent-free" in the deed, as those who hold this deed void do so on the ground that it must mean "revenue-free" likewise.

A grant exempt from the payment of *revenue* is not only declared by the the 10th Section to be null and void, but the Section expressly requires the proprietor and the Collector to dispossess the grantee. Now, can it be said that, if the land is simply granted free of rent payable to the zemindar, and he or the grantee is willing to pay the revenue, the zemindar and the Collector are bound to avoid the deed and dispossess the grantee? They certainly are, if "free of rent payable to the zemindar." means also free of revenue payable to the Government.

A grant of land *rent-free* by a proprietor does not more interfere with the revenue of the Government, or the position of the proprietor, than a lease in perpetuity at a nominal rent of one rupee annually. This lease in perpetuity has just as much effect on the revenue (which is nothing!) and on the income and resources of the zemindar, as a grant free of rent payable to the zemindar. Yet it is not disputed that the lease is binding on the zemindar and his heirs. But, it is said, the grant is not legal, because it is contrary to the Regulations and against the policy of the law which will protect the zemindar from *improvident* alienations though made on good *consideration*.

Supposing the deed, expressly granting the land rent-free, contained a covenant between the zemindar and the grantee that the former and his heirs would pay the Government revenue, would the deed be null and void because the land had been granted "rent-free," and would the zemindar and the Collector be bound to dispossess the grantee? I should think not. Again, if the grantee covenanted with the zemindar for the consideration expressed in the deed, and for which the land had been granted rent-free, that he would pay to the zemindar the quota of Government-revenue expressly declaring that it was a payment for the Government-revenue, and not for or in lieu of rent, would the deed be null and void? I should doubt it.

I shall now refer to the recognized powers and rights of the zemindars by referring to one or two of the earlier Regulations with the object of showing that a grant of land within their estate rent-free is one they have power to make.

In Regulation I of 1793, Section 9, Article 8, is to be found the following sweeping declaration—"That no doubt may be entertained whether proprietors of land are entitled, under the existing Regulations, to dispose of their estates without the previous sanction of Government, the Governor-General in Council notifies to the zemindars, independent talookdars, and other actual proprietors of land that they are privileged to transfer to whomsoever they may think proper, by *sale*, *gift*, or *otherwise*, their proprietary right, in the whole or *any portion* of their respective estates without applying to the Government for its sanction," &c.

Here is an explicit declaration that the proprietor may transfer a portion of his estate without the sanction of the Government; and I am at loss to see why they should not exercise this power, when they cannot by any alienation free the land from the tax or revenue payable to the Government.

I next refer to Regulation I of 1801 Section 14, under which I think it is clear that the right of the zemindar to create a rent (not revenue) free tenure is recognized. This Section declares that—"By Section 9, Regulation I of 1793, the zemindars and all other proprietors of land have been declared at liberty to transfer, by *sale*, *gift*, or *otherwise*, their proprietary rights in the whole or any portion of their respective estates; but by Section 10 of the same Regulation it is required that all such transfers be notified to the Collector of the zillah, &c.; but until such notification and separation shall have been made, the whole of the estate is declared responsible to Government for the discharge of the fixed jumma assessed upon it, in the same manner as if no transfer had taken place."

I think, after that declaration, it could not be contended that, unless the notification to the Collector mentioned above were given, the grant of a portion of the estate in perpetuity would be null and void as against the grantor and his heirs; for some meaning must be given to the sentence, "but until such notification and separation shall have been made, the whole estate is declared responsible." I read that sentence to mean that the Government will not recognize the apportionment or grant of any part of the zemindaree until notification; but I also treat it as recognizing the power of the zemindar to make a complete disposition of a portion of his estates with the option of having the whole zemindaree held responsible for the revenue of the portion so disposed of. The above quoted passage will dispose of any argument raised as to the interference with the revenue payable to the Government, as every fraction of the estate, including the part alienated, remains liable for its payment. The Section I am quoting from, goes on to declare—"If, therefore, any zemindar shall have disposed of his proprietary rights in any portion of his zemindaree, whether under the denomination of an independent talook *or otherwise*, and the talookdar or other person to whom the portion of an estate may have been so transferred shall have omitted to obtain a separate allotment of the public assessment thereon, in the mode prescribed by the Regulations, such transfer, *as far as respects the rights of Government*, must be *considered altogether invalid*, and if the land so privately transferred but not separately assessed, should have been since, or shall be hereafter, included in *any public sale for arrears of revenue*, the illicit and imperfect transfer must be deemed to have been altogether done away. In such cases the lands transferred, until publicly registered and separately assessed, form part of *an undivided estate*; and, as such, are liable to be sold for any arrear of revenue which may be due from any part of the estate." I think that in the above is to be found a recognition of the grant being binding on the proprietor and his heirs, and invalid as against an auction-purchaser, at a sale for arrears of revenue. It recognizes the continuance of such grant down to the sale for arreras of revenue. It interprets the word *revenue* in the 10th Section of Regulation XIX of 1793, as being confined to the revenue payable to the Government, and as not including rent payable to the proprietor of the entire zemindaree.

If the zemindar cannot make the disposition I contend he has the power to make, what becomes of his proprietary rights? They are frittered away and controlled by a shadowy distinction. Those who contend that a zemindar cannot grant a portion of his estate to a member of his family free of rent payable to him or his heirs, admit he may *lease* in perpetuity so as to bind himself and his heirs a pepper-corn rent—an alienation just as injurious to the zemindaree, as a grant of a portion of it rent-free. Sir R. Barlow and Mr. B. Colvin,

in their judgment of the 18th July 1855, reported in the Sudder Decisions of that date, use the following language:—"In fact the "law nowhere recognizes grants of land "exempt from revenue, but the power of "creating dependant talooks or granting "leases at *any rent* is fully accorded. (*See* "Section 6 Regulation XLIV of 1793, and "Regulations V and XVIII of 1812)." In that case those learned Judges drew no distinction between *rent* and *revenue*, but they have clearly announced what the law is as regards the power of the zemindar to lease away in perpetuity at any rent. In opposition to the ruling of those Judges (who did not see the distinction between rent and revenue) on the power of the zemindar to grant rent-free, Mr. Dick held as follows—"I concur with the Principal Sudder Ameen "that the grant is not resumable by the "*heirs* of the grantor, and that Section 10 "Regulation XIX of 1793 does not apply to "the case. The law could not intend to de-"clare that the party who had made the grant "could at pleasure resume it, whether given "for valuable consideration or not, or intend "to entitle the heirs of such grantor to resume. "This would be authorising such persons "to repudiate their own acts, and the acts "of their ancestors. Grants of the nature in "question *quoad* the grantors and their "heirs, affect not the public revenue. They "affect merely their own rental. The grant-"or continues himself to pay the revenue, "and if he do not, the estate is sold, and "then the grant becomes null and void. "The law (Section 10 Regulation XIX of "1793) was enacted to prevent alienations "'prejudicial to the security of the public "revenue,' not to enable proprietors and their "heirs (whose ancestors' acts are theirs) to "profit by their own wrong. The proprie-"tors and their 'successors,' who are au-"thorised to resume at pleasure, are not those "who made the grants, or their hereditary "ancestors. An auction-purchaser can annul "grants and alienations. This the law de-"clares. All *bonâ fide* alienations are bind-"ing on those who made them and on "their heirs. This justice requires, and our "precedents have decided."

Considering that there is no express law declaring a grant of land free of rent payable to the zemindar null and void, I hold the grant valid. I support the proprietary right in the soil. I prevent the grantor and his heirs annulling a *bonâ fide* deed made for valuable consideration, and I in no way interfere with the revenue payable to Government, or the right of an auction-purchaser to acquire a title free of all encumbrances on the land.

On these grounds I also hold the grant in the present case binding on the plaintiff.

The 9th January 1865.

Present:

The Hon'ble J. P. Norman, *Offg. Chief Justice*, and Shumbhoonath Pundit, *Judge*.

Mortgage (by wife)—Decree against husband—Section 21 Act I of 1845 (Purchases in name of third parties).

Case No. 2214 of 1864.

Special Appeal from a decision passed by Mr. O. Toogood, Judge of Beerbhoom, dated the 13th July 1864, affirming a decision passed by Baboo Gobind Chunder Chowdhry, Principal Sudder Ameen of that District, dated the 13th January 1864.

Ameeroonnissa Beebee (Plaintiff), *Appellant*,

versus

Binode Ram Sein and others (Defendants), *Respondents*.

Mr. R. T. Allan for Appellant.

Baboo Kishen Succa Mookerjee for Respondents.

Certain property standing in the name of a wife was mortgaged by her to one B. The mortgage debt was paid off. The mortgaged having a decree against the husband, attached and sold the property. HELD that, though payment of the mortgage debt by the wife might have given her a lien on the property to the extent of any money paid by her out of her own fund, the mortgagee's acting on the wife's assertion of title did not prevent him, when he subsequently discovered that the property was really the deceased husband's, from making it available for the satisfaction of his decree against the husband.

Section 21 Act I of 1845 does not protect purchases made in the name of third parties from the operation of decrees against the persons beneficially entitled to the purchased property.

THE plaintiff is the widow of Afzul Ali, and sues to set aside a summary order passed in execution of a decree by Binode Ram Sein against her deceased husband and certain other parties, under which certain mouzahs Churramooree and Fukeepoora were attached, and ordered to be put up to auction.

The now plaintiff appeared as an objector; but her objections being disallowed, the property was sold.

With respect to Churramooree, it appears that it was originally purchased in the plaintiff's name, and had been mortgaged by her to Binode Ram Sein; and it is asserted that the mortage money was subsequently paid off.

It is contended that Binode Ram Sein, by taking the mortgage, recognized the exclusive right of the now plaintiff in the property.

We are of opinion that this contention is wholly unfounded. If the plaintiff paid off the mortgage, she may be entitled to a lien on the property to the extent of the money paid by her. But there is nothing in the fact of Binode Ram acting upon her assertion of title on a former occasion, which should prevent him, when he discovered that the property was really her husband's, from making it available for the satisfaction of his decree.

As to Eukeerpoora, it was bought in the name of the son of Afzul Ali at a sale under Act I of 1845; and it is contended before us that, under the 21st Section of that Act, a judgment-creditor of Afzul Ali is precluded from attaching the property in execution of a decree against him.

But the Section in question was not intended to protect purchases made in the name of third parties from the operation of decrees against the persons beneficially entitled to the purchased property.

This appeal must, therefore, be dismissed with costs and interest.

The 9th January 1865.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Conveyances (alleged to be in fraud of creditors)—Beneficial possession.

Case No. 2057 of 1864.

Special Appeal from a decision passed by Mr. A. Pigou, Judge of Hooghly, dated the 20th April 1864, *reversing a decision of Baboo Jadub Chunder Dey, Moonsiff of Sulkeah, dated the 8th October* 1863.

Tara Chund Ghose (Plaintiff), *Appellant,*

versus

Mohesh Chunder Doss and others (Defendants), *Respondents.*

Baboos Hem Chunder Banerjee and *Kallee Mohun Doss* for Appellant.

Baboo Rajender Nath Bose for Respondents.

Where the main issue is whether a conveyance is a real transaction between the parties to it, and not a merely colorable transaction in fraud of creditors, evidence as to the subsequent beneficial possession of the property, and generally as to the mode in which the parties deal with it, is most important, and should have due weight given to it.

THE plaintiff (who is the appellent before us) having obtained a decree against one Nemy Churn Holdar sought to enforce it by sale of certain property. The defendants appeared and successfully claimed the property under a kubala or deed of sale from Nemy Churn. The present suit is instituted in order to have it declared that, under the alleged kubala, the property in question did not (as against the plaintiff) pass from Nemy Churn. The Court of first instance found for the plaintiff, but this decision was reversed on appeal.

In special appeal it is contended that the decision of the lower Appellate Court is wrong inasmuch as the Court held that, as the execution of the kubala and the passing of the consideration money were proved, it was unnecessary to enquire further into the *bonâ fides* of the transaction, or to determine whether there was any transfer of the property which was good as against a creditor like the plaintiff, and inasmuch as the Court entirely overlooked certain very important evidence.

We think that the judgment appealed from is on the face of it open to the objections which have been taken to it. The Judge, after saying that he considers the execution, &c., of the kubala to be proved, and that it was not proved that the purchase was made collusively, or with intent, on the part of the purchaser, to defraud the creditors of the latter, continues—"and the mere "fact of Mohesh's sister being Nemy's "daughter-in-law, and Ram Chunder being "a relative of Mohesh, is not sufficient under "the circumstances to induce the Court to "believe that there was any collusion." But there was before the Court other very strong evidence to show collusion, and that there was no real transfer of Nemy's right of property; the fact, for example, that the vendor, Nemy, and after his death, his daughter-in-law as guardian of his minor son, remained in possession of the property for many years after the execution of the kubala. In an action like this, where the main issue is whether a conveyance is a real substantial transaction as between the parties to it, and is not merely a colorable transaction in fraud of creditors, the proving the

execution of the deed and the passing of a sum of money as consideration, goes but a short way towards establishing the validity of the transfer as against the creditor who disputes it; and there can be no question that evidence as to the subsequent beneficial possession of the property, and generally of the mode in which the parties deal with it, is most important. In the present instance the Court which originally tried the suit, relied much, and rightly so, on the evidence as to the conduct of the parties after the date of the alleged transfer. If the Appellate Court differed in opinion on this part of the case, it should have assigned some reason for so doing. It should not have simply ignored the existence of this most material evidence, and it should not have expressed its judgment in such terms as lead only to the conclusion that some of the evidence before the Court was not taken into consideration by it at all.

The case is remanded to be re-heard with reference to the above remarks.

The 10th January 1865.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Onus probandi—Title-deeds—Possession.

Case No. 1914 of 1864.

Special Appeal from a decision passed by Mr. J. E. S. Lillie, Additional Judge of Hooghly, dated the 31st March 1864, reversing a decision passed by Moulvie Nazeerooddeen Mahomed, Additional Principal Sudder Ameen of that District, dated the 16th June 1863.

Nilmonee Banerjee (Plaintiff), *Appellant,*

versus

Surbo Mungula Debia (Defendant), *Respondent.*

Baboo Banee Madhub Banerjee for Appellant.

Baboos Onookool Chunder Mookerjee and *Dwarkanath Mitter* for Respondent.

Suit for title-deeds. The defendant (plaintiff's maternal aunt) pleaded that she had purchased the property in the plaintiff's name, but that she was the party beneficially interested in it. HELD that, if the plaintiff could show that he had held possession from the time of the purchase to the institution of the suit, the defendant must prove that she had herself purchased the property; otherwise the onus would be on the plaintiff to prove that the property was purchased from his own funds.

PLAINTIFF, alleging that he was in possession of a certain putnee talook, sues for the possession of the title-deeds of the property which are in the hands of the defendant. He alleges that, though brought up in the house of his maternal uncle, he had acquired property of his own, and with his own funds purchased the putnee talook in 1264, and acquired possession of the same; that his maternal uncle's wife has obtained possession of the title-deeds; he, therefore, sues for the same. He also sued for other property; but as both the Courts have rejected his claim to it, it is unnecessary to dilate on it further.

The defendant, plaintiff's maternal aunt, answers that the plaintiff was maintained and brought up by her husband; that he was a poor and indigent man; that, after her husband's death in 1259, she purchased the talook in 1264 in the name of her nephew, the plaintiff; that he managed the property until 1268, when quarrels occurred, and she took possession of the same; that, consequently, plaintiff's present suit should be dismissed.

The first Court gave plaintiff a decree for the talook for various reasons into which we need not enter. The Judge, on appeal, dismissed the plaintiff's claim to it, thinking that he had failed to show that the property had been purchased by his own funds.

Plaintiff now appeals specially, urging that the Judge has thrown the onus upon him wrongly; that as the title-deeds are in his name, in other words, as the legal estate is admittedly vested in him, it is for the defendant, who pleads that it was merely purchased in plaintiff's name but that she is the party beneficially interested in the property, to prove the same.

On looking to the circumstances stated by both parties, it is impossible rightly to determine upon which party the burden of proof rests until the question of possession is clearly determined. If plaintiff can show that, since the purchase in 1264, to the institution of this suit in 1269, he has been in possession, the burden of proof that the property, of which both possession is with plaintiff and title-deeds are in his name, was purchased by her, will clearly rest on the defendant. If plaintiff is unable to show that the property was in his possession, as owner, from

the purchase to the institution of this suit, it will then be on him to show that the purchase of the property was made from his own funds; and until he has done this, the defendant cannot be called upon for proof of this nature. As, however, it seems that neither party has produced all the evidence on this head that may be in their possession, an opportunity should be given to them for producing this proof.

We, therefore, remit the case to the Judge, with directions that he enquire first into the possession of the property as above suggested, and then taking from the party upon whom the result of the finding of the first issue will throw it, evidence as to the source whence the purchase-money came. He will then look to the evidence of the other side on this head, and pass whatever orders seem to him just and proper.

The Court sees no ground for disturbing the concurrent judgment of the lower Courts as to the property in the promissory notes.

The 10th January 1865.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Puisne Judges.*

Arbitrators (Award of—partially disagreeing).

Case No. 2186 of 1864.

Special Appeal from a decision passed by Mr. A. Pigou, Judge of Hooghly, dated the 27th May 1864, *reversing a decision of Moulvie Kazim Hossein, Moonsiff of Pandooah, dated the 26th January* 1864.

Sheikh Ponaoollah and others (Plaintiffs), *Appellants,*

versus

Sheikh Tumeezooddeen and others (Defendants), *Respondents.*

Baboos Ashootosh Dhur and Khetter Mohun Mookerjee for Appellants.

Baboo Kissen Succa Mookerjee for Respondents.

The whole award of two arbitrators should not be nullified, because they disagreed on one point and no umpire was appointed, the appointment of an umpire being unnecessary as to the matter on which they agreed.

THE special appellant in this case (plaintiff in the Court below) sued to recover possession of an 8 annas share of a tank, called Dilal Ghuree, which he alleged had been bought by his (plaintiff's) father from the owner, Radhanath Ghsoe, in 1237 B. S. He added that his brother mortgaged the property to one Tumeezooddeen (special respondent) in 1257 B. S., and that the mortgagee refused to receive the release money or to give up possession.

During the pendency of the suit, Prankissen Ghose, a son of the Radhanath Ghose abovementioned, intervened, alleging that the sale by his father to the special appellant's father was a conditional one only, and that the property had been redeemed in 1269 B. S.

The question was at first submitted to arbitration with the consent of both parties. Unfortunately, however, no umpire was appointed, as required by law, and the two arbitrators differed in opinion on one point; Hurrimohun considering that the sale by Radhanath Ghose, special appellant's father, was absolute, the other Gobind Chunder, that it was conditional only. They both, however, appear to have agreed that the property had been mortgaged to Tumeezooddeen in 1257, and that no payment had been made by either Radhanath or Prankissen.

The Moonsiff took up the case on the former point at the request of both parties, and decided that the sale by Radhanath was an absolute sale. He went according to the award of the arbitrators as regarded Tumeezooddeen's mortgage, and gave plaintiff a decree for the land claimed.

The Judge on appeal, however, disregarded the award of the arbitrators in toto, and finding on the evidence that the sale by Radhanath in 1257 was a conditional one only, and that the intervenor (Radhanath's son) had redeemed the property in 1269, reversed the Moonsiff's order and dismissed the plaintiff's case.

It is urged in special appeal that both arbitrators were agreed as to one of the points submitted to them, and that their award on that point was final, and the Judge could not disturb it.

The Judge has ignored the arbitration award on two grounds, 1st, because the application was not made by the parties in person, or by pleaders specially authorized in their behalf; and 2nd, because no provision was made under Section 316 of Act VIII for a difference of opinion by the appointment of an umpire.

With regard to the first objection, we observe that, according to the provisions of Section 17 of the Civil Code of Procedure, whenever the personal appearance of a

party to a suit is required by the Act, such appearance may be made by his recognized agent; and as the present application was made by the recognized agents of both parties, the Moonsiff's order was not *per se* illegal in this case. Moreover, there was no doubt about the consent of the parties interested; and even had the Court of first instance been wrong, the error, as it did not effect the merits of the case, would not have been sufficient to invalidate the award.

The Moonsiff was doubtless wrong in not making provision for a difference of opinion between the arbitrators by appointing an umpire; and so far as those arbitrators disagreed, the matter of course fell to the ground. But we are not disposed to nullify the entire award merely because the arbitrators disagreed on one point only, or to rule that an agreement come to by parties specially charged to arbitrate is to be *ipso facto* set aside irrespective of all considerations of right and equity, because an umpire was not appointed. On all points wherein the arbitrators might agree, no umpire could interfere, so that in the present case *quoad* one part of the award, an umpire would have been useless

The points on which the arbitrators agreed were, that the property in suit had been mortgaged by the special appellant's brother to Tumeezooddeen, and that Tumeezooddeen had colluded with the son of the original holder of the tank, Radhanath Ghose, and had given up to him the deed of sale which he had received at the time he became the mortgagee. They agreed also that Prankissen Ghose had not redeemed the property although they differed, as to whether he had the equity of redemption or not.

This was a clear award in the special appellant's favor. He claimed the equity of redemption as against Tumeezooddeen, and sued to recover the mortgaged property on payment of the sum due. Now, as the arbitrators found that the mortgage was made to Tumeezooddeen as stated, and also, that Prankissen, whether he had the equity of redemption against the special appellant or not, had never either paid or offered to pay the mortgaged money, this amounted to giving special appellant a decree for recovery of possession on payment to Tumeezooddeen, which was the relief sought.

We think, therefore, that the Judge should have considered so much of the case to have been decided.

With regard to the Moonsiff's decision that the sale to special appellant's father was absolute, the Judge of course had jurisdiction, and his judgment that the sale was not absolute but conditional only, being based on evidence, is one of fact with which we cannot interfere in special appeal. But the finding that the property was redeemed, was, we think, illegal, as the arbitrators had already decided the point the other way.

We hold, therefore, that the special appellant is entitled to recover as against Tumeezooddeen on payment of the mortgage money without interfering with Prankissen's right to redeem the property, whenever he may choose to do so; and we modify the Judge's order accordingly.

Under the circumstances of the case, we think that each party should pay his own costs.

The 10th January 1865.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice* and Shumbhoonath Pundit, *Judge.*

Costs.

Case No. 1142 of 1862.

Special Appeal from a decision passed by Syud Ahmud Bux, Principal Sudder Ameen of Dacca, dated the 4th March 1862, *affirming a decision passed by the Moonsiff of that District, dated the 27th September* 1860.

The Collector of Dacca (one of the Defendants), *Appellant,*

versus

Kumalakant Mookerjee (Plaintiff), Chundy Churn (Defendant), *Respondents.*

Baboo Kishen Kishore Ghose for Appellant.

None for Respondents.

HELD that, where parties who have no interest in a suit are unnecessarily made co-defendants, the lower Court ought, as a general rule, to award them costs; but that, as by Section 187 Act VIII of 1859, the awarding of costs is left to the discretion of the Court, no appeal lies from its decision.

THIS was a suit for the possession of land by the reversal of a thakbust award.

The plaintiff made the Collector of Dacca the co-defendant.

The first Court gave the plaintiff a decree but released the Collector, and in so doing refused to award any costs to him, thinking that it was necessary to join the Collector as co-defendant.

The Collector appealed to the Principal Sudder Ameen for his costs; the Principal Sudder Ameen dismissed the appeal, and from that decision the Collector now appeals to this Court.

We are of opinion that, in this, as well as in other cases in which parties who have no interest in the suit are unnecessarily made co-defendants, it is as a general rule proper for the lower Court to award them costs as an indemnity against the expenses to which they have been needlessly subjected; but as, by the 187th Section, the awarding of costs is a matter left to the discretion of the Court, we are of opinion that no appeal lies, and we therefore cannot reverse the decree of the lower Court, although we may not be disposed to think it entirely satisfactory. The appeal must be rejected without costs, no one appearing for the respondent.

The 10th January 1865.

Present:

The Hon'ble H. V. Bayley and G. Campbell,

Judges.

Alluvial Lands.

Case No. 334 of 1863.

Regular Appeal from a decision of Baboo Greesh Chunder Ghose, Officiating Principal Sudder Ameen of Backergunge, dated the 30th March 1863.

Mr. J. P. Wise and others (Defendants), *Appellants,*

versus

Ameerunnissa Khatoon (Plaintiff) *Respondent.*

Messrs. R. V. Doyne and *R. T. Allan* and *Baboo Onnocool Chunder Mookerjee* for Appellants.

Baboos Kishen Kishore Ghose, Grija Sunker Mozoomdar, Kally Mohun Doss, Hem Chunder Banerjee, Dwarkanath Mitter, Unodapershad Banerjee, and Chunder Madhub Ghose for Respondent.

If a chur be surrounded by water fordable at any point, the owner of the land to which the chur adjoins has a *primâ facie* title to it under Clause 3 Section 4 Regulation XI of 1825. The *status* of the land at re-survey, not on first formation, is to be looked to under Act IX of 1847.

Mr. Justice Bayley.—In this suit plaintiff claims certain lands as appertaining to a part of chur Kulkinee by accretion, *i.e.*, by the right conferred under Clause 1 Section 4 Regulation XI of 1825.

Defendant's case is, that plaintiff is unable to show any title; and that, consequently, as defendant holds possession under an award of a competent Court, *i. e.*, under Act IV of 1840, plaintiff cannot disturb such possession. Defendant adds that he holds the lands as part of his diluviated and re-formed lands of Selempore, admitting that, between the main land and these re-formed lands, a non-fordable stream exists, or in other words resting his case on Clause 2 Section 4 Regulation XI of 1825.

I will briefly notice the evidence relied on in this case. The Assistant Magistrate, Mr. Bell, on the 2nd December 1857, reported that the chur was an island, *i. e.*, it was on four sides surrounded by water not fordable; and that defendant Wise was in possession of the land. This enquiry was made by Mr. Bell, an Assistant Magistrate, with reference to a case under Act IV of 1840, then pending in the Criminal Court, and in which case Wise eventually obtained an award in his favor.

The next year the plaintiff petitioned the Revenue Authorities to take legal measures to resume the land in dispute, and settle it with plaintiff as an increment of chur Kulkinee. The Collector on the 30th December 1858 visited the spot, and on the 4th February 1859, reported in substance that Mr. Bell had rightly, on his visit, held the land in dispute to have then been non-fordable water on all four sides, and that in fact such was still the case *except* at one end of the dhone or stream which divided it from chur Kulkinee, where it could be forded at low water. The result, however, of the report was that Government did not think it right to take any action till the period of re-survey under Act IX of 1847 should arrive.

The Principal Sudder Ameen has held that the land in suit is not an accretion contiguous to plaintiff's chur such as to admit her claim to it under Clause 1 Section 4 Regulation XI of 1825; but that plaintiff's claim to it is valid under Clause 3 of that Section, on the ground that "the land in suit could be reached or come at on foot through the dhone."

The Principal Sudder Ameen accordingly decreed plaintiff's suit, and defendant appeals.

Mr. Doyne contends for appellant, that plaintiff has shewn no title; and that until she does so, all that the Courts have to do is to dismiss the suit, inasmuch as defendant's possession under the award of a competent Court, namely, that of the Criminal Court under Act IV of 1840, cannot be disturbed by plaintiff without proof of plaintiff's title; and further that, under such circumstances,

the Principal Sudder Ameen was wrong to go to the question of defendant's title at all.

Mr. Doyne, in support of his allegation that plaintiff has not shewn any title, urges that Mr. Dalrymple, in his report of the 4th February 1859, distinctly adopts Mr. Bell's report of 2nd December 1857, as to the land in suit *being then* surrounded by *non-fordable* water; that such being the fact, plaintiff could have no title either under Clause 1 or Clause 3 of Regulation XI of 1825. Further, that Sections 6 and 7 Act IX of 1847 look to the *status* of the land in dispute at the time of *its first becoming land out of water* as the basis upon which to frame a decision in regard to the title arising to any party, and that those Sections do *not* look to the status *at the time of re-survey* as a means of deciding title according to the *then* character of the land; *i. e.*, whether it is an increment by gradual accretion under Clause 1 Section 4, or land divided by fordable water under Clause 3.

Mr. Doyne argues that, if this were not the correct view, a contiguous land-owner might find that land he had held as an admitted accretion, and consequently legally his, and on which he had for years expended large sums, settled ryots, &c., might, on being found an island at the time of re-survey, pass at once into the hands of Government, and the former legal owner be ousted and ruined by an accidental change in the natural features of the locality.

I think that Mr. Doyne is so far right that, whatever may be the merits or demerits of an award under Act IV of 1840, it must be considered an undoubtedly legal award of a competent Court. Then it follows, as a recognised rule of law, that possession under it can only be set aside, on the party seeking so to do shewing some sufficient title. The question therefore to be decided here is whether plaintiff has shewn such title in this suit. But that depends in this particular case, in the first instance, on the legal question whether the status of the land when it *first formed* is to be regarded, or the *present* status.

On a consideration of all the evidence, I am clearly of opinion that, when the land in dispute first formed out of the water, it was surrounded by water non-fordable. I am also clearly of opinion that on the 30th December 1858, it was intersected by a dhone, a portion of which *was fordable;* and if fordable at *any point*, it is in my opinion sufficient to give plaintiff a title under Clause 3 Section 4 Regulation XI of 1825, such as would be enough to set aside the mere summary award of defendant under Act IV of 1840, *if firstly* the status of the land up to the period of the original formation is *not* to be looked to, and if *secondly* defendant do not shew a superior title to plaintiff, by proving that the lands in suit are a re-formation of original diluviated land of his Selempore.

On the *first* of these questions, I think, Sections 6 and 7 Regulation IX of 1847 do *not* require us to look to the status of the land at the period when *it first* formed. These Sections certainly do not express this, nor do I think they imply it. On the contrary Section 3 speaks of the object of the law "to be a new survey of lands on the banks of "rivers and on the shores of the sea, in order "to *ascertain the changes that may have* "*taken place since the date of the last previous survey*, and to cause new maps to be made *according to such new survey.*"

Sections 5 and 6 (as to resumption and assessment) speak of changes, which *may have taken place during the period between the two surveys*, and the orders are to be passed on the status *discovered* in the *second survey.*

Section 7 clearly designates the principle that the claim of Government to islands shall be put forward "on inspection of such *new map*," *i. e.*, such new map recording the changes *since* the "last previous survey." It is needless, when the enactment does not, as it seems to me, admit of doubt as to intending that the status at the time of original formation is *not* to be looked to, but the status at the time of re-survey alone is to be regarded, to go into the illustration of consequences suggested by the learned Counsel. But I may note that, if this be not the right interpretation of the law, maps on re-survey, would be required to represent localities as they *were*, not as they *are* at the time of re-survey.

Such being my view on the first of these questions, it only remains for me to state on the second that, after considering all the evidence shewn by us by defendant, I see no sufficient proof the defendant's averment, that the land in suit is diluviated land re-formed on the original site of the defendant's village of chur Selempore.

I may here notice that I regard the disclaimer of Government in this suit in favor of plaintiff as no legal evidence of plaintiff's title, although I regard the reports and proceedings of its officers, which have been

relied upon by both parties as shewing certain facts on certain dates, as legal evidence.

I may add on the second ground of the petition of appeal, that plaintiff's rights are not those solely of farmer, but also of an original co-parcener in the resumed chur Kulkinee, and on the ninth ground that the decision of 4th May 1863 (Roy Kantnath Chatterjee *vs.* Ameerunnissa) is beforea third Judge; nor does the point of reference effect the main arguments pressed on us in this appeal.

Under all these circumstances I would reject this appeal with costs.

Mr. Justice Campbell.—I concur in the decision at which Mr. Justice Bayley has arrived. I consider that—

1*st.*—Plaintiff as the riparian proprietor to which the chur now adjoins has the *primâ-facie* title.

2*nd.*—That the Government having confessed judgment and surrendered all claim to the chur as an island, no other party can (without title of his own) dispute plaintiff's claim on the allegation of an island formation.

3*rd.*—That it is not shown that the chur ever was an island separated by a stream unfordable at all times and seasons.

4*th.*—That defendant having made out no title whatever, must he considered a mere squatter, and cannot resist plaintiff's claim.

The appeal is dismissed with costs.

The Weekly Reporter,

APPELLATE HIGH COURT.

No. 3.] FEBRUARY, 1865. [Vol. II.

The 11th January 1865.

Present :

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble Shumboonauth Pundit, *Judge*.

Sale of personal property by a co-sharer—Liability of purchaser—Jurisdiction of (Small Cause Courts).

Case No. 2829 of 1864.

Special Appeal from a decision passed by Baboo Gopee Nath Bose, Principal Sudder Ameen of Nuddea, dated the 18th July 1864, *modifying a decision of Baboo Bistoo Chunder Banerjee, Moonsiff of Koosteah, dated the 21st March* 1864.

Radhanath Shaha (Defendant), *Appellant*,

versus

Kameenee Soonderee Dossee (Plaintiff), and another (Defendant), *Respondents*.

Baboos Gopal Lall Mitter and *Bungsee Dhur Sein* for Appellant.

Baboo Purbutty Churn Mitter for Respondents.

If A sells moveable property belonging to himself and B, and there is nothing to show that they were partners, or that A was authorized to receive payment for B, the purchaser may be sued by B for the price of B's share.

Small Cause Courts have jurisdiction to entertain such a suit.

THE plaint alleges that certain bricks and wood (part of the materials of an old house) belonged to the plaintiff and one Nobin; that the defendant took a part of them after fixing a price of rupees 660 for them. The plaintiff sued for the price of her share and claimed a balance of rupees 285-15; she recovered rupees 159.

The defendant appealed to the Principal Sudder Ameen on the ground (*inter alia*) that he had paid the whole of the price to Nobin the plaintiff's co-sharer. The Principal Sudder Ameen disallowed the objection; and we think that he was right in doing so, because Nobin and the plaintiff were not partners; and there is nothing to show that Nobin had authority to receive the plaintiff's share as her agent or otherwise.

The defendant having appealed specially to this Court, the plaintiff objected that the suit was one maintainable in a Small Cause Court under Act XLII of 1860 Section 3, and that therefore the right of special appeal was taken away by Section 27 Act XXIII of 1861.

We think it clear that the suit was for money due for personal property, namely, the plaintiff's share of the goods in question. We, therefore, think that the objection is well founded, and dismiss the appeal with costs and interest. Had the suit been on a necessarily entire contract, or had the plaintiff and Nobin been partners, the plaintiff could not have split the cause of action and sued alone for her own share. But that difficulty is not shown to exist in the present case, which is found to be the sale by one co-sharer of the property of another.

The 11th January 1865.

Present :

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble Shumbhoonauth Pundit, *Judge*.

Pre-emption—Dispute as to amount of purchase money.

Case No. 2778 of 1864.

Special Appeal from a decision passed by Mr. F. Tucker, Judge of Shahabad, dated the 28th June 1864, *reversing a decision of Baboo Burmo Dutt, Moonsiff of Buxar, dated the 31st December* 1863.

Achurbur Panday and others (Plaintiffs), *Appellants,*

versus

Buckshee Ram and others (Defendants), *Respondents.*

Baboo Mohinee Mohun Roy for Appellants.

Baboos Kishen Succa Mookerjee and *Mohesh Chunder Chowdhry* for Respondents.

The right of pre-emption is lost where there is a dispute as to the purchase money, if the plaintiff (instead of offering by his plaint to pay the real amount whatever it may be) claims to purchase a specific quantity of land at a specific price, and that right is shown to have no existence.

PLAINTIFF sued to establish a right of pre-emption to certain property sold to the defendants by a co-sharer with the plaintiff, alleging that the share sold was 2 annas 8 pie, and that the purchase money was rupees 600, claiming pre-emption on payment of that sum.

The lower Court found that the share was 4 annas, and the purchase money was rupees 1,200, and dismissed the suit.

We think that the decision was correct, for, assuming that the plaintiff might have been entitled to a declaration of his right of pre-emption notwithstanding a dispute as to the amount of the purchase money (as to which see Macnaghten's Principles of Mahomedan Law, Chapter IV., Section 12, and Precedents Case 7, page 191) had he offered by the plaint to pay the real amount of the purchase money, whatever it might be, in the present case his claim was to purchase a specific quantity of land at a specific price, and that alleged right was shewn by the finding of the Court to have no existence.

We dismiss the appeal with costs and interest.

The 11th January 1865.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble Shumboonauth Pundit, *Judge.*

Co-sharers (Sale in execution of decree against one of several)—Rights of the others.

Case No. 2420 of 1864.

Special Appeal from a decision passed by Mr. F. A. Glover, Officiating Judge of East Burdwan, dated the 29th March 1864, *modifying a decision passed by the Principal Sudder Ameen of that District, dated the 6th November* 1862.

Sath Bathee Dossee, mother and guardian of Bishumher Bose, minor, (Defendant), *Appellant,*

versus

Mutthungeenee Dossee and others (Plaintiffs), *Respondents.*

Baboo Poornoo Chunder Mookerjee for Appellant.

None for Respondents.

If a co-sharer pays the Government revenue in respect of another share, and sues and obtains a decree against one of several persons interested in that share, and sells the share in execution of that decree, the interests of the other persons not sued are not affected by a decree to which they were not parties, or by a sale, which did not profess to bind their interests.

IN this case 2 annas of a certain talook were recorded in the name of Doorga Narain, of which 2 annas the plaintiffs, Mutthungeenee and Bemolah, widows, were entitled to a three-fourths share.

Nobo Kisto, a co-sharer in the same talook, paid the Government revenue in respect of this two anna share. He sued Doorga Narain for the amount, and obtained a decree under which he sold the two anna share.

The plaintiffs, Mutthungeenee and Bemolah, who are the widows of the brother and nephew of Doorga Narain, sued the purshaser for their shares, and obtained a decree. The special appellant alleges that Doorga Narain having been manager, and the debt having been contracted for the benefit of the family, the shares of the plaintiffs were bound by, and passed to him under, the sale in execution of the decree against Doorga Narain.

We are of opinion that this contention is not well founded. The money having been paid at the instance of Doorga Narain as manager for the benefit of all the co-sharers in the two annas, Nobo Kisto might, no doubt, have instituted his suit against all the parties interested in the 2 anna share. But having failed to include the widows as co-defendants, the now purchaser is not in a position to say that their interests are affected by a decree to which they were no parties, or by a sale which did not profess to bind their interests.

Under these circumstances the special appeal must be dismissed without costs, no one appearing for the respondents.

The 12th January 1865.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Hindoo Law—Sales by Widows—Legal necessity.

Case No. 1929 of 1864.

Special Appeal from a decision passed by Mr. L. Beaufort, Judge of the 24-*Pergunnahs, dated the* 31*st March* 1864, *affirming a decision passed by Moulvie Attaoollah, Moonsiff of that District, dated the* 28*th December* 1863.

Pranhuree Kur (Defendant), *Appellant,*

versus

Saroda Churn Ghose and others (Plaintiffs), *Respondents.*

Mr. R. E. Twidale for Appellant.

Mr. A. F. Lingham and *Baboos Banee Madhub Banerjee, Obhoy Churn Bose,* and *Romanath Bose* for Respondents.

The case having been remanded to the lower Courts to determine whether certain sales by widows were valid under Hindoo Law, and the first Court having found that the sales were legal and given the plaintiff a decree, the lower Appellate Court was wrong in looking only to the plaintiff's possession, and dismissing the appeal instead of trying the issue whether the sale were legal.

This case was before the Court on a previous occasion, and it was then remanded in order that the lower Courts might determine whether the sales by the widows were made to pay their husband's debts, or for any necessary purposes under Hindoo Law. The first Court has now found that the sales were made by the widows for the liquidation of debts contracted by their husband; that they were legal under Hindoo Law; and consequently plaintiff was entitled to a decree.

The Judge on appeal, looking only to the possession of the plaintiff, dismissed the appeal with costs.

Defendant now appeals specially, urging that the Judge has tried the case altogether on a wrong issue; that he had only to look to the point on which the lower Court had decided the case, *viz.*, were the sales made by the widows for purposes valid under Hindoo Law; and as he has not noticed this point, the case should be remitted for further investigation.

We think that the contention of the defendant is correct, and that he is entitled to a finding on the issue as stated by him. We, therefore, remit the case to the Judge in order that he will come to a clear finding on that issue, after a careful consideration of the evidence on the record relating to the point in dispute.

The 12th January 1865.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Limitation (Instalment of Kistbundee).

Case No. 2195 of 1864.

Special Appeal from a decision passed by Mr. James Reily, Principal Sudder Ameen of Dinagepore, dated the 1*st April* 1864, *reversing the decision of the Moonsiff of Sheebgunge, dated the* 1*st February* 1864.

Enaetoollah Chowdhry (Plaintiff), *Appellant,*

versus

Hurro Chunder Da (Defendant), *Respondent.*

Baboo Poorno Chunder Moakerjee for Appellant.

None for Respondent.

Each instalment of a kistbundee, as it accrues due, constitutes a fresh cause of action.

In this case there seems to have been a very substantial error in the judgment of the lower Appellate Court, as there is no question that each instalment of a kistbundee, as it accrues due, constitutes a fresh cause of action.

But we have no jurisdiction to entertain this special appeal, as the amount sued for did not exceed 500 rupees; and Section 27 of Act XXIII of 1861 declares that there shall be no special appeal in such cases. We are, therefore, compelled to dismiss the appeal.

The 12th January 1865.

Present:

The Hon'ble C. Steer and E. Jackson, *Judges.*

Suit for balance on bond—benamee lease.

Regular Appeals from a decision of Mr. Octavius Toogood, Judge of Beerbhoom, dated the 19*th May* 1864.

Case No. 283 of 1864.

Sheikh Misraooddeen Mahomed *alias* Juroo Meah (Defendant), *Appellant*,

versus

Sheikh Naegwar Hosesin (Plaintiff), *Respondent.*

Case No. 284 of 1864.

Sheikh Misraooddeen Mahomed *alias* Juroo Meah (Defendant), *Appellant*,

versus

Sheikh Attur Ruhumun (Plaintiff), *Respondent.*

Baboos Unodapershad Banerjee and *Debender Narain Bose* for Appellant.

Baboos Kishen Kishore Ghose, Jugodanund Mookerjee and *Obhoy Churn Bose* for Respondents.

Suit by A for unpaid balance due from B on a bond. B pleaded that he gave A a lease in C's name, out of the proceeds of which lease A was to pay himself the stipulated instalment according to the bond. HELD that it was a necessary issue in the case whether the lease in C's name was really given for A's benefit.

THESE two suits were instituted by the plaintiffs on exactly the same grounds. The judgment, therefore, in one case will apply in the other.

It appears, that the defendant, Maharajah Bunwarree Govind Bahadoor, borrowed from the plaintiff's 71,250 rupees on a bond, dated the 28th Pous 1264. By this deed, the Rajah bound himself to pay to the plaintiffs rupees 15,430 yearly instalments on account of the debt.

On the same day that the Rajah borrowed the above sum from the plaintiffs, he gave a lease of his property to the defendant, Misraooddeen. This person was to pay the Government Revenue, a small sum to the Rajah, and the yearly instalment due from the Rajah to the plaintiff on account of the bond.

Subsequently the terms of the lease were altered. Instead of Misraooddeen, the farmer, having to pay to the plaintiff 15,430 rupees, on account of the yearly instalment upon the bond, it was agreed that the farmer was to pay to the plaintiff only 13,968 rupees yearly, and the Rajah engaged to settle with the plaintiffs for the balance of the instalment. It is for the unpaid balance due from the Rajah that the present suits are brought, and the suit is against both the Rajah and Misraooddeen, the farmer.

It is as well to state though the matte is not of much importance as affects the decision of the questions involved in this case; that the plaintiffs have taken a sub-lease of the property from Misraooddeen.

The Rajah, defendant, says that the suit is premature; that the farm given to Misraooddeen ostensibly was given in reality to the plaintiffs; and that, while they hold the property in usufructuary mortgage, no action will lie against him on account of any lapsed instalments.

The lower Court has dismissed the suit, holding that the lease given to Misraooddeen was a benamee one, and that the plaintiffs themselves were the real lessees.

There is no appeal on the part of the plaintiffs; but Misraoodeen finds fault with the judgment. He contends that there was no need why he should have been made a party to the suit, and there was no need to try whether his lease was a *bonâ fide* one or a benamee one; and he requires that the finding of the lower Court in respect to the nature of his lease may be cancelled, and his costs of suit awarded to him.

The pleader for the appellant declines to read the evidence as to the *bonâ fide* or benamee nature of the transaction. All that we are called upon, therefore, to do is to decide whether it was an issue in the case whether the lease was benamee or not, and whether the Judge ought to have found upon that point.

The plaintiffs sued the Rajah on a bond. The Rajah said he gave the plaintiffs a lease in the name of Misraooddeen, out of the profits of which lease the plaintiff was to pay himself the stipulated instalment according to the bond.

Certainly, as between the plaintiff and the Rajah, the question does arise whether the plaintiff was not in fact the farmer holding in the name of Misraooddeen; for, on the decision of this question, depends whether the plaintiff is entitled to come down on the Rajah for any lapsed instalment due on the bond. If the plaintiff is the farmer, he cannot sue for the instalment; if he is not, he can sue for it. Therefore, the question must be tried; and if it must be tried, there must be an adjudication. What the effect of the finding in this case may be in any after suit between the plaintiff and Misraooddeen, it does not devolve upon us to say. The judgment must stand; and it will be for the Court before which the question, as between the plaintiff and the defendant Misra-

ooddeen may arise, to declare what the effect of the present decision may be.

The appellant having failed in his contention, the appeals stand dismissed with costs.

The 12th January 1865.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Hindoo Law—Succession by uterine and half-brothers.

Case No. 2264 of 1864.

Special Appeal from a decision passed by Mr. R. Abercrombie, Judge of Dacca, dated the 31st March 1864, *reversing a decision passed by Moulvie Syud Ahmed Buksh, Principal Sudder Ameen of that District, dated the 21st June* 1862.

Tilock Chunder Roy (Plaintiff), *Appellant,*

versus

Ram Luckhee Dossee and others (Defendants), *Respondents.*

Baboo Woomesh Chunder Banerjee for Appellant.

Baboo Chunder Madhub Ghose for Respondents.

A and B being uterine brothers, and C a brother by by another mother, on A's death B and C will succeed equally to the state of their deceased brother.

THE appeal is on a question of Hindoo Law A, B, and C, are brothers, the two first uterine, and the other by another mother. A dies. Who is to succeed to his property?

The property in question is a joint undivided estate, and under such circumstance it is laid down in Macnaghten's Hindoo Law, Volume II, page 66, that both surviving brothers, uterine and he of the half-blood, succeed equally to the estate of their deceased brother. Semble Colebrooke's Dyabhaga, page 200, and Colebrooke's Digest, volume III, page 518.

The Judge was, therefore, right in law; and we dismiss the special appeal with costs.

The 12th January 1865.

Present:

The Hon'ble C. Steer and E. Jackson, *Judges.*

Purchase—Possession—Title.

Case No. 2519 of 1864.

Special Appeal from a decision passed by Mr. W. Ainslie, Judge of Patna, dated the 20th May 1864, *affirming a decision passed by Moulvie Syud Ali Hyder, Moonsiff of that District, dated the 29th September* 1863.

Syud Mahomed Shumsool Hoada (Defendant), *Appellant,*

versus

Syud Moneerool Hug (Plaintiff), *Respondent.*

Messrs. R. E. Twidale and *C. Gregory* and *Moulvie Aftabooddeen Mahomed* for Appellant.

Baboo Greesh Chunder Ghose for Respondent.

The question being whether A purchased the property in suit for himself or for B,—HELD that the evidence on behalf of B that he was in possession, was evidence of the purchase having been made for B, and that that was in fact a finding as to the title of B.

THE question in this case was wheter the property in suit was purchased by Wellaiut Hossein for himself, or for the plaintiff whose general agent he was.

Both Courts have found that Wellaiut Hossein was the plaintiff's agent, and that the plaintiff, subsequent to the purchase, got possession, and was in possession for nine years. This evidence of possession satisfied the Judge that the title was with the plaintiff.

It is urged that the Judge should not have decided only on the ground of proof of possession, but should have looked to title.

We think he has decided that the plaintiff's title is established. He thinks that, in a question whether Wellaiut purchased the property for himself or for the plaintiff, the evidence on the side of the plaintiff that he was in possession is evidence that the purchase was made for the plaintiff, and that is in fact to find that the title of plaintiff is established.

In this view, we dismiss the special appeal with costs.

The 12th January 1865.

Present:

The Hon'ble C. Steer and E. Jackson, *Judges.*

Onus probandi—Suit against a purchaser in possession for more than 25 years.

Case No. 1475 of 1864.

Special Appeal from a decision passed by Mr. F. Cockburn, Judge of Backergunge, dated the 16th March 1864, *affirm-*

ing a decision passed by the Principal Sudder Ameen of that District, dated the 20th January 1863.

Madhub Chunder Ghose and another (Plaintiffs), *Appellants,*

versus

Nilkant Shaha Roy and others (Defendants), *Respondents.*

Baboos Romesh Chunder Mitter and *Luckhee Churn Bose* for Appellants.

Mr. A. F. Lingham and *Baboo Kalee Mohun Doss* for Respondents.

Where the right of A to a howalah is not denied, and B seeks to dispossess a purchaser from A in possession for more than 25 years, B is bound to prove that he acquired the howalah in the way, he alleges, *viz.*, in the exercise of his zemindarry right upon the relinquishment or abandonment of the howalah by A.

THE plaintiff, being the zemindar, sues the defendant, who is in possession of an howalah within his zemindarry, on the following allegation:—The howalah belonged to Kaloo Bibee, who in 1244 sold all her *other* property, situated in the zillah of Burrisaul to one Mr. Paul; but she made no transfer, by sale or otherwise, of the howalah in dispute, and the plaintiff's mother, as the zemindar, took possession of it, held it for a year or so, and was then dispossessed by Mr. Paul. The suit is, therefore, instituted to recover possession from the defendant who derives his title by purchase from Paul or his privies.

The defendant utterly denies these allegations of the plaintiff. He pleads that Kaloo Bibee sold the howalah to Mr. Paul who held it in his name, and that the howalah has been held ever since by the several successive parties who at different times were the purchasers.

The first Court went fully into the case, and considered that the howalah was sold to Paul by Kaloo Bibee, that Paul held possession of it, and that the allegation of the plaintiff that Kaloo Bibee relinquished and that his mother got into possession of it, was utterly false.

The Judge thought that it rested with the plaintiff to prove that Kaloo Bibee relinquished the howalah, and that his mother was in possession of it. He thinks that there is no proof of this, and he agrees in the whole view of the case taken by the Court of first instance, and dismisses the suit.

Objection is taken to this judgment on the ground that the plaintiff being the zemindar, and the defendant setting up a plea of purchase of the howalah, it is competent to the plaintiff to challenge the title of the defendant; and that unless the defendant can prove that the howalah was actually sold by Kaloo Bibee to Paul, the plaintiff, as the zemindar, would be entitled to dispossess the defendant.

The Court of first instance, whose judgment the Judge fully coincides in, has found as a fact that the howalah belonged to Kaloo Bibee, was sold by her and held by Paul and by parties purchasing from him from the date of Kaloo Bibee's purchase up to the present time. The Court finds also that it is not true that Kaloo Bibee abandoned the howalah, and that the plaintiff's mother was in possession of it. If, therefore, the defendant was the party on whom it lay to prove that the howalah was included in the sale to Paul, that proof has been afforded. But where the right of Kaloo Bibee to the howalah is not denied, and the plaintiff seeks to dispossess a party who stands on a title of purchase from Kaloo Bibee, and supports his title by a possession of more than 25 years; it is most decidedly incumbent on the plaintiff to prove that he acquired the howalah in the way he alleges, *viz.*, in the exercise of his zemindarry right upon the relinquishment or the abandonment of the howalah by Kaloo Bibee. He failed to sustain this allegation by any trustworthy evidence; and both Courts were of opinion, and properly so, that this unsupported allegation was incredible upon the face of it.

There being no validity, in our opinion, in the objection taken to the judgment, we dismiss the special appeal with costs.

The 12th January 1865.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Resumption of invalid lakheraj—Release by Government of land under 50 Beegahs.

Cases Nos. 2291 and 2292 of 1864.

Special Appeals from a decision passed by Baboo Sreenath Bidyabagish, Principal Sudder Ameen of East Burdwan, dated the 13th April 1864, *affirming a decision passed by Baboo Tara Kristo Holdar, Additional Sudder Ameen of that District, dated the 13th July* 1863.

Mrs. B. O. Elias (Plaintiff), *Appellant*,

versus

Brohmo Moyee Burmonee (Defendant), *Respondent.*

Mr. R. E. Twidale for Appellant.

Baboo Prosunno Coomar Sein for Respondent.

The release by Government of land under 50 beegahs in extent as a boon to the cultivator is not *per se* a bar to the zemindar's suit to resume it as invalid lakheraj.

It has been frequently ruled by this Court in suits like the present, that the mere fact of Government releasing land under 50 beegahs in extent as a boon to the cultivator, is not *per se* a bar against the zemindar seeking to *resume* it as invalid lakheraj.

The question of validity must be gone into the usual way.

The decision of the Principal Sudder Ameen is, therefore, reversed, and the special appeals decreed with costs on special respondent.

The 12th January 1865.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Damages—Embankments.

Case No. 2207 of 1864.

Special Appeal from a decision passed by Mr. L. W. Hutchinson, Additional Principal Sudder Ameen of East Burdwan, dated the 22nd February 1863, *reversing a decision passed by the Moonsiff of that District, dated the 31st December* 1862.

Gooroo Churn Mullick (Plaintiff), *Appellants,*

versus

Ram Dutt and others (Defendants), *Respondents.*

Baboo Brojendro Chunder Seal for Appellant.

Baboo Grish Chunder Ghose for Respondents.

Suit for damages caused to the plaintiff's land by the bursting of the defendant's bund. Held that the plaintiff was not entitled to damages, if the bund was made in a lawful manner, and if the breach was owing to no fault of the defendant.

In this case the question was as to damages caused to the plaintiff's land by reason of its being flooded by water which flowed from the land of the defendants. The defendants had a small *bund* or ridge between their land and the land of the plaintiff; and through that bund the water flowed, which did the alleged damage. The lower Appellate Court found that the defendants "created the ridge, not wantonly, but for their benefit in a lawful manner;" and that it was "no fault of theirs that the ridge was washed away in a certain part during the rains and thereby caused damage." It also found that there was no evidence that the defendants "purposely made the ridge a weak one to injure their neighbours."

In special appeal it was urged that, under any circumstances, as the *bund* had been moved, and damage had been caused, the defendants were liable.

But we see no error in the decision of the lower Court, and we think that the plaintiff could not be entitled to damages so long as the *bund* was created by the defendants in a lawful manner, and so long as it was no fault of theirs that it was burst during the rains. Had the Court found that the moving the *bund* was unlawful, or that the *bund* was not made properly,—was not such as might be reasonably expected to resist the water-flood, and such as any careful man would have erected,—then no doubt a liability for the damage caused would have arisen. Here, however, all the facts are found in favor of the defendants, and the Court rightly decided that they are not responsible. We do not consider that the statement of the lower Court, that the defendants did not purposely make a weak bund, is to be read as in any degree declaring an opinion on the part of the Court that the bund was in fact weak. If it had been weak, the Court could not have found that it was made in a lawful manner.

We think that the order of the Appellate Court is substantially a reversal of the whole order of the Court of first instance, both as to damages and as to the removal of the bund.

The appeal is dismissed with costs.

The 12th January 1865.

Present:

The Hon'ble C. Steer and E. Jackson, *Judges.*

Suits to establish right to attached property—Jurisdiction of Small Cause Courts.

Case No. 2546 of 1864.

Special Appeal from a decision passed by Baboo Goopeenath Bose, Principal Sud-

der Ameen of Nuddea, dated the 6th May 1864, reversing a decision passed by Baboo Umbica Churn Mitter, Moonsiff of that District, dated the 16th February 1864.

Woomesh Chunder Bose (Plaintiff), *Appellant,*

versus

Muddun Mohun Sircar and others (Defendants) *Respondents.*

Baboo Doorga Doss Dutt for Appellant.

None for Respondents.

The plaintiff's claim to property sold in execution of a decree having been rejected under Section 246 Act VIII of 1859, he sued to establish his right. The property being moveable property and in value less then 500 rupees, it was held that he was bound to bring his suit in the Small Cause Court.

SOME bricks were sold in execution of a decree. Plaintiff claimed to be the owner; his claim was refused; and he now sues in the Civil Court to recover the value of the bricks, and to establish his right to them.

The Principal Sudder Ameen holds that the plaintiff ought to have sued in the Small Cause Court, and dismissed his suit.

It is urged that, as there was a question of right, this point could only be established in a Civil suit.

We think this contention is erroneous. The plaintiff's claim having been rejected under Section 246 Act VIII of 1859, he was bound to bring a suit to establish his right to the brick; but he must do so in the proper Court, which Court, as the bricks are personal property and in value less than 500 rupees, is the Small Cause Court. The Principal Sudder Ameen is, therefore, right in his judgment, and we dismiss the special appeal.

The 12th January 1865.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Evidence—Second power of Attorney recognizing a first.

Case No. 1998 of 1864.

Special Appeal from a decision passed by Mr. W. Ainslie, Judge of Patna, dated the 30th April 1864, affirming a decision passed by Moulvie Syed Sukhawut Hossein, Principal Sudder Ameen of th District, dated the 19th March 1862.

Hosseinee Jan (Defendant), *Appellant,*

versus

Mukhdoomun (Plaintiff), *Respondent.*

Baboos Kishen Succa Mookerjee and *Khett Nath Bose* for Appellant.

Mr. C. Gregory and *Moonshee Ameer A* for Respondent.

A power of attorney authorising the registrati of a deed of mortgage, and recognizing a previo power to execute the deed of mortgage, is admissil as original evidence by way of admission of t previous deed.

THIS case was remanded by this Court the lower Court in order that a finding migl be come on a question raised by the defenda in the case now in special appeal before u *viz.*, was the mookhtearnamah by which Mah med Baker, defendant's son, executed tl deed of mortgage, itself duly executed by tl defendant or not?

The Judge finds that, although the origi al deed is not produced, yet the mookl tearnamah executed by defendant authori ing the registration of the deed of mor gage, recognises the previous power to ex cute the deed of mortgage; that these tw mookhtearnamahs form part of one conti uous transaction; and that the admission b defendant in the second instrument of th genuineness of the first is conclusive a against her, and, in its presence, the absenc of the original power of attorney is comp ratively immaterial. He, therefore, gav plaintiff a decree.

Defendant now appeals specially, urgin that the admission of the secondary evidenc until the absence of primary is accounted fo is contrary to the law of evidence; and as i this case the primary evidence, the firs power of attorney itself, is not produced and no reason given for its non-productio the suit of the plaintiff should have bee dismissed.

The principle laid down by special appe lant is a very sound and wholesome rul but is inapplicable to the present case. Her we have, in one continuous transactio two powers of attorney executed by th same person, the second recognising th first. This recognition in the second prove deed of the first by the party executing both is an admission conclusive against her as t the genuineness of both the deeds, and i secondary evidence in no proper sense o that term as to the first deed. We, there fore, reject the appeal with costs.

The 12th January 1865.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Limitation—Right of defendant to take objection of, without appeal—No deduction under old law.

Case No. 1972 of 1864.

Special Appeal from a decision passed by Moulvie Nazeerooddeen Mahomed, Principal Sudder Ameen of Hooghly, dated the 23rd April 1864, affirming a decision passed by the Sudder Ameen of that District, dated the 18th April 1863.

Okhetoonissa (Plaintiff), *Appellant,*

versus

Koochil Sirdar and others (Defendants) *Respondents.*

Baboos Mutty Lall Mookerjee and Roopnath Banerjee for Appellant.

Baboos Unnoda Pershad Banerjee and *Dwarkanath Mitter* for Respondents.

Under Section 348 Act VIII of 1859, a defendant may take the objection of limitation without filing an appeal.

The pendency of a suit in a Court without jurisdiction under Section 14 Regulation III of 1793, did not entitle a party to any deduction in computing the period of limitation.

PLAINTIFF sues to set aside an order of the Civil Court, dated 1st September 1849, and a subsequent sale made in conformity with that order, which has rejected his claim to certain property—a claim which he now re-asserts.

Defendant pleaded limitation, and denied the right of the plaintiff.

It appears that more than eleven years after the order of 1849, *viz.*, on the 5th October 1861, plaintiff instituted a suit in the Moonsiff's Court to reverse the order of September 1849, and the subsequent sale; but eventually, on the 20th April 1862, the case was struck off, inasmuch as the Moonsiff had no jurisdiction. On the 25th April 1862, the case was instituted in a competent Court. Looking to these dates, the Principal Sudder Ameen was of opinion that plaintiff was out of Court under the statute of limitations.

Plaintiff now appeals specially, urging that he is entitled to a deduction of the time during which his suit was pending in the Moonsiff's Court; and 2*nd*, that as on appeal, after the first Court had decided the case on the merits, defendant did not, by a separate petition, appeal against the order of the first Court as to the non-applicability of the statute of limitations, it was not competent to the Principal Sudder Ameen to take that point up at the trial.

We are clearly of opinion that, under the law in force, Act VIII of 1859, at the time when this suit was heard, it was not necessary for the defendant to file a separate petition of appeal against the ruling of the lower Court on the point of limitation. That point might, without such appeal, be raised by respondent under Section 348 at the hearing of the suit. As to the objections urged by plaintiff to the application of the statute of limitations, they are of no avail. The main cause of action to plaintiff was the order of September 1849; from that period up to December 1862, when Act XIV of 1859 came into play, more than 12 years had elapsed, and during that period he never brought his suit in a Court of competent jurisdiction. To bring a suit in a Court without jurisdiction under Section 14 of Regulation III of 1793, did not entitle a party to any deduction at all. We are, therefore, of opinion that, under the law of limitation applicable to plaintiff's suit, he is out of Court, and we reject this application with costs.

The 12th January 1865.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Direct issues (by ryot as to zemindar's title, and as between two co-defendants).

Case No. 2018 of 1864.

Special Appeal from a decision passed by Baboo Koylash Chunder Dey, Principal Sudder Ameen of the 24-Pergunnahs, dated the 3rd May 1864, reversing a decision passed by the Sudder Ameen of that District, dated the 9th October 1863.

Degumber Mitter and others (Defendants), *Appellants,*

versus

Khettur Mohun Mitter (Plaintiff), *Respondent.*

Baboos Mohendro Loll Shome and Khetter Nath Bose for Appellants.

Mr. R. T. Allan and *Baboos Banee Madhub Banerjee* and *Anund Chunder Ghossal* for Respondent.

A ryot cannot raise a direct issue as to the title of his zemindar.

An issue between two co-defendants also is contrary to practice.

PLAINTIFF in this case sued for possession of certain lands belonging to the tenure of Indur Narain Holdar, in the zemindaree of Tara Pershad Roy, and purchased by him at a sale for arrears of rent, of which he has been dispossessed by the defendant.

The defendant pleads that the lands in dispute are within his estate; that they never belonged to Indur Narain Holdar; that Indur Narain Holdar had never any tenure at all; and that he never dispossessed the plaintiff.

The first Court found that the lands in dispute were never Indur Narain Holdar's; that the alleged title of Indur Narain Holdar is all fraudulent, and that the lands have always been in the possession of Degumber defendant.

The Principal Sudder Ameen was, for reasons given by him, of opinion, that the main issue in this case was in what mehal the disputed lands are situated, *viz.*, whether in the plaintiff's zemindar's estate, or that of the defendant, and he remanded the case for re-trial on that issue.

Defendant now appeals specially, urging that the order of the Principal Sudder Ameen raises an interpleader between the defendants in this case; that this is an incorrect course; that the main issue in this case is whether the lands in dispute are within the tenure of Indur Narain Holdar purchased by plaintiff of which defendant has dispossessed plaintiff, or are they in defendant's estate, and have always been in his possession.

We think that there is great justice in the defendant's contention, and that we cannot allow a ryot to raise directly his zemindar's title, but must restrict the issue as regards him to his own title, though a decision on that point may indirectly determine the title of his zemindar. Moreover, the issue, as laid down by the Principal Sudder Ameen, raises a direct issue between two co-defendants, which is altogether contrary to practice. As, then, we think that the issue above stated, for which the defendant contends, is the correct one, we direct the Principal Sudder Ameen to recall the case from the Court of first instance, and to try that issue himself, and to pass whatever judgment the justice of the case seems to require.

The Weekly Reporter,

APPELLATE HIGH COURT.

No. 4.] FEBRUARY, 1865. [Vol. II.

The 14th January 1865.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Mahomedan Law—Pre-emption—Private partition.

Case No. 2158 of 1864.

Special Appeal from a decision passed by Moulvie Iradut Alli, Principal Sudder Ameen of Shahabad, dated the 21st May 1864, reversing a decision of Mr. S. DaCosta, Sudder Ameen and Moonsiff of that District, dated the 10th October 1863.

Gopal Sahi and others (Defendants), *Appellants,*

versus

Ojoodheapershad and others (Plaintiffs), *Respondents.*

Baboo Kallee Kishen Sein and *Moulvie Aftaboodeen Mahomed* for Appellants.

Baboos Debender Narain Bose and *Greesh Chunder Ghose* for Respondents.

According to Mahomedan law, a shareholder in the property sold has the first or strongest right of pre-emption.

A private partition, though not sanctioned by official authority, if full and final as among the parties to it, will have the same effect as the most formal partition on the right of pre-emption.

Mr. Justice Bayley.—PLAINTIFF sued for 1 anna 6 gundas of land out of 2 annas 13 gundas in the *third* puttee or parcel of a certain village, and for the setting aside a purchase made by defendant, Gopal Sahi, of the said land. Plaintiff bases his claim on right of pre-emption and the due performance of the formal preliminaries requisite according to Mahomedan Law.

Plaintiff further alleges that defendants are not shareholders in the third puttee in which the land lie, but in a distinct puttee

Defendants pleaded in the first Court that plaintiff had not duly made the formal demands required by Mahomedan Law; that, by the purchase made by defendants on the 6th March 1863, plaintiffs were cognizant that the defendants were before co-sharers; and that although the *puttees* are recognized as divided amongst the shareholders, there has not been any officially recognized partition.

Upon these pleadings the first Court put in issue, *first*, whether plaintiffs had duly performed the necessary preliminaries; *second*, whether defendants were equally co-sharers; *third*, whether the private partition affected the claim of pre-emption, there being no official butwarra.

The first Court held (1) that the plaintiff had *not* performed the formal preliminaries requisite under Mahomedan Law; (2) that both plaintiff and defendants were co-sharers; (3) that the village was joint, being one on t rent-roll, notwithstanding the private partition alleged.

The first Court dismissed the plaintiff's suit accordingly.

Plaintiff appealed, and the Principal Sudder Ameen put the same issues as the 1st and 3rd of the above, but he put the issues as to right of pre-emption in the following form: "Is plaintiff entitled to a right of pre-emp- "tion to the third puttee as Shuffee Khuleet, "*i. e.*, holder of lands *adjoining* those to "which the claim is preferred, or are the "defendants purchasers, co-sharers?"

The lower Appellate Court held that it was admitted that the *village* was privately divided amongst plaintiff and his co-sharers, the defendant's purchasers, and found that "the disputed property is within the third "puttee the partition of which is spoken of "by the plaintiff, and that plaintiff is "*co-sharer* as regards the third puttee." The Principal Sudder Ameen proceeds: "Hence he, plaintiff, is undoubtedly Shufee "Khuleet, and the vendee defendants are "co-sharers as regards *another* puttee. The "defendants have no concern with the third "puttee." "The other puttee" (the Principal Sudder Ameen adds) "was declared to "be the share of the defendants (purchasers) "and others."

The Principal Sudder Ameen then holds that the private partition is sufficiently valid, and that the formal demands were duly made by plaintiff, and the Principal Sudder Ameen decrees plaintiff's suit accordingly.

Defendant appeals specially, and urges in his petition—

1*st*. That if plaintiff have rights of pre-emption by reason of *coparceny*, defendant has equal rights by reason of *contiguity*.

2*nd*. That defendant, as purchaser of 1 beegah 3 ks. of Sungsar Sing's share of the third puttee, was an owner and coparcener.

3*rd*. That the lower Appellate Court did not find at what precise time the plaintiff first heard of this sale with reference to the formal demands necessary by Mahomedan Law, and that plaintiff should have proved this point.

On the *first* plea I may observe that the Mahomedan Law gives the right of pre-emption "in the order enumerated"—"A "partner in *the property sold*, a *participa*-"*tor* in its appendages, and a neighbour" (*Vide* page 47, Macnaghten's Mahomedan Law, Madras Edition, 1864). Therefore the first plea is untenable.

The *third* plea is also untenable for the lower Appellate Court has substantially found as a fact that the formal demands were *duly* made.

On the *second* plea the following facts are found :—

1*st*. That the land sold, *i. e.*, "*the disputed property, is in the third puttee.*"

2*nd*. That "*plaintiff is a co-sharer as regards the third puttee.*"

3*rd*. That "*defendants purchasers*" (special appellants) "have no concern with the *third puttee*," *but* "*are co-sharers as regards another puttee.*"

It is true that defendant pleads orally before us, in variance of the first part of the petition of special appeal, that, as co-sharers of one beegah 3 cottahs of Sungsar Sing's share in the *third puttee*, they are co-sharers equally with plaintiff. But we have the fact found by the lower Appellate Court that they are not so.

The real contention, indeed, now seems to be that, as the *third puttee* is not officially partitioned, and as they, defendants, are purchasers of 1 beegah 3 cottahs of Sungsar Sing's share in that *puttee*, they are thereby also co-sharers in the disputed land, *i. e.*, "*in the property sold.*"

Thus, in order to see if this plea is good, it is necessary for this Court to decide if the private partition has separated entirely the *third puttee* into two properties; and if so, whether coparceny in the *entire* estate is sufficient to give a right of pre-emption to defendant in this case.

The law is clear that the coparceny must be *in the property sold*. Now it is clear that the property sold is in the *third puttee*. But then comes the question on the pleadings :—Is the whole of the *third puttee one property* or *two* distinct properties? It is found by the lower Appellate Court that defendants' purchased land was in *another puttee;* in other words, that the partition, which was valid, made the defendants' a distinct property from the plaintiff's.

The further question then remains whether the lower Appellate Court held rightly that a private partition, not sanctioned by official authority, could make two distinct properties out of that which was on the rent-roll as one. I think it could, because the property contemplated by Mahomedan Law was not viewed by its position on a Government rent-roll for the purpose of security of revenue; but by the test whether the property was really held as distinct property and not joint amongst the owners themselves. In this view I would hold that coparceny in the entire village gave no right of pre-emption in this case to defendant, special appellant.

Under these circumstances I would dismiss this special appeal with costs.

Mr. Justice Macpherson.—I concur in thinking that this appeal must be dismissed. There is no doubt that, according to Mahomedan Law, a sharer in the property sold has the first or strongest right of pre-emption; and that, on the facts as found by the lower Court, it must, for the purposes of this ap-

peal, be taken as conclusively settled that the plaintiff is a sharer in the *third puttee*, the property sold, and that the defendant the purchaser is *not*.

It is contended that the plaintiff and the defendant who purchased have equal rights, because both were originally sharers in the whole village, and did not, by reason of the partition which took place, cease to be so in such a manner as to alter their title to claim the right of pre-emption, inasmuch as the partition was private and not officially recognized in the Collectorate books or otherwise. But I agree in the opinion that, so long as the partition was complete and final as among the parties to it, it sufficed to alter their position as effectively, so far as regards the exercise of the right of pre-emption, as if it had been made and recorded in the most formal manner possible.

The appeal is dismissed with costs.

The 14th January 1865.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson *Judges.*

Right of action (by Hindoo Widow)—Disclaimer (by sons)—Limitation.

Case No. 2052 of 1864.

Special Appeal from a decision passed by Mr. Pierce Taylor, Judge of East Burdwan, dated the 1st March 1864, *reversing a decision of Mr. Samuel Wright, Sudder Ameen of that District, dated the 27th May* 1863.

Ram Kannye Gossamee (Defendant), *Appellant,*

versus

Meernomoyee Dossee (Plaintiff), *Respondent.*

Mr. R. V. Doyne and *Baboos Kishen Kishore Ghose* and *Onoocool Chunder Mookerjee* for Appellant.

Mr. R. T. Allan and *Baboos Dwarkanath Mitter* and *Rajender Misser* for Respondent.

A Hindoo widow cannot sue as representative of her husband when sons are alive; nor will a petition filed by the sons in a suit brought by her as such representative (in which petition the sons state that she has always been in possession of the property in suit, and was entitled to sue) cure the defect in her title.

Held further by Macpherson, J., that, in the absence of proof that the widow was the next reversioner after the sons, even a disclaimer by the sons prior to the institution of the suit, if it did not amount to an absolute assignment to the widow, would not entitle the widow to sue.

Mr. Justice Bayley.—Plaintiff in this case sued as widow of her deceased husband. Her plaint was entirely silent as to the existence of other heirs, or as to any disclaimer by them of their rights in her favor. The suit was for possession on the right of her husband's purchase, and to reverse an order of the Magistrate, dated 27th December 1854, and of the Sessions Judge, dated 12th January 1855, under Act IV of 1840. Her plaint was filed on the 31st December 1861—the last day she could be in time.

The defendant pleaded that plaintiff had no *locus standi* in Court, as the plaintiff's husband had left two sons by another wife; and that under Hindoo Law those sons would be the heirs to the deceased, and not the plaintiff.

Upon this plea being taken, the two sons petitioned the Court, first to the Judge on the 21st July 1862 before remand, and then to the Sudder Ameen in this case on the 17th December 1862 (*i. e.*, the first, six months—and the second, nearly one year—after the suit), stating that they had no objection to plaintiff suing; that they had always lived with a maternal uncle in Calcutta; and that plaintiff was the party enjoying the rights and in possession of the property of their deceased father.

The first Court held that the plaintiff could not (there being sons) properly sue as widow; but that, as the sons had made this disclaimer, the suit might proceed. The first Court found as a fact that the purchase of the plaintiff's husband was *not* proved.

On appeal the lower Appellate Court held that the declaration of the sons of the 17th December 1862 showed that the plaintiff had the right to sue on the 31st December 1861, the date of her plaint, and that thus plaintiff was not barred by limitation, or by absence of right to sue. Upon the facts the lower Appellate Court found that plaintiff's husband's alleged purchase was proved, and decreed plaintiff's suit and appeal accordingly.

The special appeal here is on the one ground that plaintiff had no right to sue on the 31st December 1861, as the two sons were then heirs; and that the fact of the sons of plaintiff's husband not having put in any disclaimer till the 21st July 1862 before the Judge on the first appeal nor till the 17th December 1862 in this suit,

plaintiff's period of limitation having admittedly expired on the 1st January 1862, plaintiff was barred and had no *locus standi* in Court, being on date of suit a Hindoo widow with husband's son surviving.

It is admitted by both parties that plaintiff's own period for bringing the suit expired on the 1st July 1862, and that the earliest petition was filed on the 21st July 1862 before the Judge, and that the other in this suit was filed in the first Court on the 17th December 1862. But it is contended that the disclaimers in these petitions speak of plaintiff's enjoyment of right and possession, as of date *antecedent to the institution of this suit*; and that, *therefore*, these disclaimers give plaintiff her right to sue before the suit, and so also make her suit within time.

In support of this contention we are referred to some cases; but the main one, and the only one like this, is a case (page 241, Marshall's Reports, Rujoneekant Mitter *vs.* Premchand Bose, decided 31st December 1862) in which the plaintiff's maternal aunts, childless Hindoo widows who were entitled to a prior life-interest to which plaintiff's reversion was subject, filed a petition disclaiming their interest and assenting to the suit. There this Court ruled that the plaintiff might have a decree founded on the disclaimers of the widows.

On the other hand it has been strongly pressed on us for special appellant, that plaintiff can have no higher position than she had on the 31st December 1861, when she sued; that her position then was of a Hindoo widow suing for her husband's property, when two of his sons were alive and had not *then* made disclaimer in her favor; that the following day she would have been out of time by the law of limitation; so that at date of suit she must be regarded as having no disclaimer in her favor, the earliest petition not being till 21st July 1862; and that consequently she had, as a Hindoo widow with sons surviving, no *locus standi* in Court according to Hindoo Law.

It is quite clear that the case above cited did allow a disclaimer to give a right to sue in a case in some respects analogous to this, but in some respects different. Here it is clearly sought to give the disclaimer *retrospective* effect; there it is not exactly shown when the disclaimer was filed, except that it was on the record of the case and may be presumed to have been filed after the plaint. There, however, no question of plaintiff being barred by lapse of time seems in any way to have arisen. Here it does arise, and I do not think that any petition subsequent to plaint can give the plaintiff a *status* at the time of filing her plaint, which she had *not* then or on the next day when her time for suing admittedly expired, *i. e.*, the 1st January 1862. The petitions may, it is true, be regarded as acknowledging that the plaintiff enjoyed the right and possessed the property of her husband *antecedent* to the 31st December 1861. But *I think we have to regard plaintiff only as she stood on the date of suing*, or on the next day when she would have been out of time. She stands then on the 31st December 1861 when she filed her plaint, and on the next day when her limitation expired, as a Hindoo widow whose husband's sons were surviving, and thus without any legal rights. She had thus, in my opinion, in such a position, no *locus standi* in Court.

I would, therefore, decree this special appeal with costs.

Mr. Justice Macpherson.—I concur in thinking that the plaintiff's suit must be dismissed. The plaintiff sued to have an order in an Act IV case set aside, and to obtain possession of certain lands. In her plaint she described herself as widow of Nundogopal Mullick deceased, and she showed no title to the property in question save as being the heiress and representative, according to Hindoo Law, of Nundogopal. The defendants pleaded that she had no right to sue, because she was not the representative of her deceased husband, as he had left two sons, who were still alive, and who were his heirs. Upon this the sons, more than six months after the suit was instituted, filed a petition in which they declared that the plaintiff was in possession of all their father's property, and had, therefore, full right to sue. Before this petition was put in, the claim had become barred by lapse of time, the original plaint having been filed the very last day on which it was *not* barred.

The Court is asked by the respondent to hold that, under such circumstances, the suit has been properly brought by her, and is not barred by the law of limitation.

In this case it is perfectly clear that the plaintiff had no title to the lands in dispute at the time she filed her plaint. It is contended now that she does not say expressly in her plaint that she sues as widow and heiress. She does, however, say so in sub-

stance, because she describes herself as widow, and because on the face of her plaint she had no title whatever unless she had title as representing her husband. Then it is said that she should be allowed to sue because she alone has at all times possessed and enjoyed her husband's estate. But, if she has so possessed the estate, that will not give her a title as heiress so long as the sons are alive, nor will it give her a title as assignee of the sons so long as, in fact, there is no assignment, and they retain their rights as heirs, and are in a position to assert their rights whenever they please. It may be that the sons have allowed the widow to hold the father's estate and manage it without reference to them; but there is no evidence whatever that they ever formally or otherwise transferred to her their rights as sons. And it is worthy of note that, even in the petition filed in this suit, they do not make any such transfer, or say they have made any such transfer. The petition merely says that the plaintiff has possessed the estate, and therefore has a full right to sue. Moreover, if it could be held that there had been an absolute disclaimer on the part of the sons prior to the institution of the suit, I think that such a disclaimer, if it did not amount to an absolute transfer of the property they inherited from their father, would have been insufficient to entitle the plaintiff to sue. For a mere disclaimer would have the effect of vesting the inheritance in the reversioner, and the widow would not be reversioner, and would not take under a disclaimer, so long as the sons disclaiming had sons alive. There is no evidence in this case to show that the plaintiff is the person who, supposing the sons to have simply disclaimed, would take the inheritance as next heir.

Various decisions of this Court have been referred to and relied on in argument by the plaintiff's pleader, but they are none of them precisely in point. There was the case of Mote Koonwar *versus* Tekait Hurhur Narain Singh,* and others of that class. But these are cases in which the plaintiff, having a title at the time of suing, got a decree based upon that title, although he had in his plaint set up another title which he turned out not to have. The present case is totally different, being one in which the plaintiff had no title when she sued, but contends that her no title was confirmed, and made a good title by the petition subsequently field. Then there was the case of Chunder Mohun Koondoo *versus* Sonamoyee Dosseet, which turned wholly on special circumstances and the position of the parties, and cannot be treated as a precedent of general authority. The Court held that the plaintiff had no such title by inheritance as she set up, but considered that the defendant was not in a position to question her title, being an utter stranger to the family, and having without any title in himself forcibly ousted the plaintiff who had been long in possession. The Court further found that the property in question was small, and that it was not shewn that the plaintiff had any other means of maintenance to which at least she was entitled. There are no similar special circumstances in this case now before us, save that the plaintiff, no doubt, is entitled to maintenance out of her husband's estate. But a right of maintenance does not by itself alone (even if it can do so under special and peculiar circumstances) give a right of action as representing the estate out of which the maintenance is payable. Lastly, there was the case of Rujoneekant Mitter *versus* Premchand Bose‡. That case, however, differs in this respect that the person suing was the undoubted reversioner, and the estate necessarily vested in him on disclaimer by the persons immediately entitled; also those who disclaimed acknowledged the plaintiff "to be the rightful heir disclaiming right of their own." In the present instance the person suing was not necessarily the reversioner, supposing that the sons had disclaimed, unless neither of the sons had issue; and as a matter of fact, the sons (as I have already stated) do *not* fully disclaim, acknowledging the plaintiff to be the rightful heir. Further, in that case no such question as to limitation arose as arises in the present instance; and the effect of dismissing that suit for the reasons pleaded would have been merely to leave the plaintiff to bring a fresh action.

On the whole, I am of opinion, that the plaintiff, when she sued, had no title on which she could maintain her suit, and that the petition subsequently filed by the sons of her deceased husband did not remove that defect in her case. The appeal must be allowed with costs.

* No. 94 of 1860, decided November 29th 1862.

† No. 277 of 1864, decided July 28, 1864.

‡ Marshall's Reports, page 241.

The 14th January 1865.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Jurisdiction—Suit for possession and mesne profits.

Case No. 2317 of 1864.

Special Appeal from a decision passed by Mr. James Reily, Principal Sudder Ameen of Dinagepore, dated the 25th May 1864, *reversing a decision passed by the Moonsiff of that District, dated the 11th January* 1864.

Makoojoo Noshya and others (Defendants), *Appellants,*

versus

Dohur Mahomed (Plaintiff), *Respondent.*

Baboo Woomesh Chunder Banerjee for Appellants.

Baboo Banee Madhub Banerjee for Respondent.

A suit to recover possession of land and mesne profits can be brought in the Civil Court.

THE only point taken in this appeal raises a question of jurisdiction. No objection was taken below that the suit was not cognizable in the Civil Court.

We observe that the suit was by one jotedar to recover land from his co-sharer in the jote, from whom, it was alleged, he had purchased one-third of the jote. Mesne profits were also claimed.

It has been ruled by this Court* that a suit to recover possession of land, if mesne profits be claimed simultaneously, may be brought in the Civil Courts.

The appeal is dismissed with costs and interest.

* Ram Lochun Doss, Plaintiff, Appellant, *versus* Mungul Sheikh and others, Defendants, Respondents, No. 767 of 1863, 8th January 1864.—Justices Morgan and Shumboonath Pundit.

The 16th January 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Mahomedan Law—Marriage and Legitimacy.

Case No. 461 of 1854.

Regular Appeal from a decision passed by Mr. W. Ainslie, Judge of Patna, dated 20th June 1864.

Khajah Mahomed Gouhur Ali Khan (Defendant), *Appellant,*

versus

Harratoonissa, widow of Burkutoolla, and, on her death, Wahed and Habiboolla, son of Wahed Ali (Plaintiffs), *Respondents.*

Messrs. A. F. Lingham and *R. E. Twidale, Moonshee Ameer Ali,* and *Baboos Dwarkanauth Mitter* and *Unnoda Pershad Banerjee* for Appellant.

Messrs. R. V. Doyne and *C. Gregory,* and *Baboos Kishen Kishore Ghose* and *Kalee Prosunno Dutt* for Respondents.

Suit laid at rupees 3,97,879-6-18-18-6.

The Mahomedan Law allows legitimacy to be inferred from circumstances without direct proof.

THIS is an old case, which was remanded, by the Privy Council on the 29th of July 1863. The particulars of the action are as follow:

The Plaintiffs in 1853 brought their suit against Alla Rukhee Begum for herself and as guardian of the present appellant, Gouhur Ali, and against certain other defendants, whose position will be disclosed hereafter, for two-thirds share of the property left by Khajah Mahomed Ibrahim Khan. The suit was brought by the plaintiffs as next heirs, on the allegation that the defendant, Alla Rukhee, was never married to Abdool Kadir *alias* Wuzeer Jan; that the latter was insane and impotent, and that Gouhur was not even a son of his body.

The subjoined tree will show the exact position of the family:—

Khaja Bahadur.

(1) Aboo Mahomed Khan, died Bhadro 1249, Fuslee, married Fatima *alias* Doolhun Begum, sister of Ismail Khan.

(2) Khajah Barkat Ali, married Ashrafunissa.

(3) Wahed Ali.

Habiboolla (Plaintiff).

Wajed Hossein.
Wahed Hossein, (Plaintiff).

Surat or Shazadi Begum.
(1) Mahomed Ibrahim or Nowab Jan, married Khadeja *alias* Hossinee Begum, divorced her; and died childless.
(2) Abdool Kadir or Wazeer Jan, died in Poosh 1249, Fuslee, or January 1842, married Alla Rukhee in 1236.

Gouhur Ali Khan, (Defendant).

The Judge, Mr. W. Travers, on the 31st of May 1854, dismissed the claim of the

plaintiffs, holding the suit to be a conspiracy to deprive Gouhur Ali of his lawful rights, and the claim to be inherently weak and worthless.

On the 22nd of December 1857, the late Sudder Court reversed the decision of the Judge, and decreed the claim of the plaintiffs, holding that the marriage of Wuzeer Jan with Alla Rukhee was not proved, and that Gouhur Ali had no claim to retain the property.

Their Lordships of the Privy Council remarked in appeal that, although the Judge has pronounced the suit to be a conspiracy, he had given no reason for arriving at this conclusion; while, on the other hand, the Judges of the Sudder Court had not thrown the *onus* of proving their case on the plaintiffs. Their Lordships, consequently, remanded the case for such further evidence as either party might offer, observing that the plaintiffs must prove "their heirship, "which depends on the illegitimacy of "the appellant; and that they must give "sufficient general evidence to throw upon "him the burden of proving his legitimacy."

It is necessary to observe, to prevent confusion, that there is a mere clerical error in their Lordships' order, the name of Ibrahim Khan having been written for that of Wuzeer Jan; and that of Khadeja for Alla Rukhee.

The case has again been tried by the present Judge, Mr. Ainslie, who, after taking the evidence most carefully, and after reviewing it in detail, has arrived at the conclusion that Gouhur Ali is really the son of Wuzeer Jan and Alla Rukhee; but that he is not legitimate; and that though his father and mother did cohabit, the cohabitation was not that of man and wife.

The case has now been very fully argued before us on the oral evidence, which is extensive, backed by some few documentary proofs; and that the whole contention, as already observed, is as to the legitimacy of the appellant, Gouhur Ali, on which the case entirely rests under the Mahomedan Law.

We will first deal with the oral evidence on both sides. We find the evidence, by which the plaintiffs endeavour to prove that Wuzeer Jan was impotent, and that he was never married to Alla Rukhee, to consist of the depositions of 13 witnesses examined by the Judge, and of three more taken by commission. It is, generally, to the effect that the deponents never heard of any marriage between the said parties, and never knew Alla Rukhee; that Wuzeer Jan was either lame or weak in his lower limbs, and had to be lifted on to his horse or pony; that it is usual in the family to have a kabinnamah, or marriage settlement, drawn out in marriages, and that none is forthcoming in this instance; that Gouhur Ali was never heard of until after the death of his asserted father; and that his father was never married at all to any one.

A good deal of this evidence, we observe, is hearsay. The facts alleged as to lameness, inability to move without assistance, and wearing of leg-irons for support (evidence of Shere Ali) do not amount to evidence of impotency for sexual intercourse. The evidence can only be taken to mean that Wuzeer Jan was weak or paralyzed in his lower limbs, and that he required assistance to mount on horseback. Pari Rukshaka Begum, whose evidence was taken by commission, does indeed boldly assert that Wuzeer Jan was unable to beget a child; but how this lady could venture on such an assertion, it is not very easy to conceive, nor are we inclined to place any credit on it. And we observe that her evidence does admit that Alla Rukhee was a maid-servant, who was employed at the house of Aboo Mahomed. Bundah Ali, the physician, only says that the lower part of the body was powerless. It is remarkable, however, that Syud Ali, whose daughter the defendant has married, denies the marriage of his son-in-law's father, and, consequently, impugns the appellant's legitimacy; but on cross-exmination, this witness admits that, in the event of proof of the illegitimacy of Gouhur Ali, the deponent would get a share of Aboo Mahomed's property through Fatima, whose brother the deponent is. Matadin, a witness, examined by commission, says but little; but what he does say is rather in the defendant's favor, as it shows that there were always two stories about the parentage.

The evidence for the defendant, which is that of some 23 witnesses is certainly vague in some particulars, and the Judge considers that a part of the depositions is false, while he appears to lay some little stress on the failure of the appellant to give exact particulars as to the parentage of Alla Rukhee. We, indeed, know nothing of her, save that she came from Delhi to Patna many years ago, and that her father's name was Sheikh Kurreem. At the same time, we observe that several of these witnesses, Mir Unwar Ali for instance, and Rajut Hossein, speak to facts within their own knowledge, derived from conversations with Wuzeer Jan in his life-time, or from his brother Nowab Jan, showing that the appellant was acknowledged by his father and uncle. Khaja Maezud-

deen was present at the marriage, and so were Mir Rajub Ali and Khadim Hossein and others. The barber deposes to having circumcised Gouhur Ali as the son of Wuzeer Jan and Alla Rukhee. The evidence of Maha Khanum, taken by commission, is also clear and full as to the marriage and legitimacy; and it is corroborated by that of Amiroonissa and Man Bibi, which is much to the same effect.

That Gouhur Ali was placed on the Guddi in succession to his father, by Fatima, his grandmother, in the presence of a number of persons, is unquestionable; and it is shewn, by her petition presented in May 1850, in the case for succession under Act XIX of 1841, that she acknowledged him as her grandson; nor can we refuse to accept this document as some evidence *quantum valeat*, seeing that it was laid before the Sudder Court in 1857, and it was not objected to.

Then, on the whole evidence, it is quite clear that the Judge below has not endorsed the plaintiff's contention as to the impotency of Wuzeer Jan. On the contrary, he finds, as a fact in clear terms, that Wuzeer Jan and Alla Rukhee did cohabit, and, in appeal, we have heard but very little endeavour or argument to make us think that the Judge is wrong on this point, while a perusal of the evidence itself leads us to precisely the same conclusion, *viz.*, that, on the question of parentage and issue of the body, there can be no doubt.

This being so, it is argued by Mr. Allan that a very slight proof of marriage would be sufficient; and that so clear are the precedents, and so jealous is the Mahomedan Law of illegitimacy in offspring, if the blot can by any fair means be avoided, that the lawful inferences, and the presumption arising out of the facts so clearly proved, do support the assertion of marriage and the title of the defendant.

We remark that the Judge is in error in one part of his decision, where he lays stress on the omission of Gouhur Ali's name in the deeds of partition of the property of Aboo Mahomed and of Shahzadi Begum, his daughter. Wuzeer Jan had died in the life-time of his father, and he would take nothing. The appellant only derives his claim after the death of his uncle, Nawab Jan, who divorced his wife, Khadeja, and died without issue.

Then, as to Gouhur Ali's own marriage with the niece of Ismail Khan and the daughter of Syud Ali, it is not likely, we think, that a man in Syud Ali's position would knowingly marry his daughter to a person who was, as contended for the plaintiff, *nullius filius*; and it is very significant that though Ismail, in the present suit, in which he has been made a defendant, denies the parentage and legitimacy of Gouhur Ali, yet he, in the summary case under Act XX of 1841, as shewn at page 72 of the printed proceedings: for the Privy Council, did, in the broadest manner, acknowledge the marriage of Wuzeer, this person's ability to beget children, and the consequent legitimacy of Gouhur Ali. At that time such a declaration was against Ismail's own interests, and the effect thereof cannot be invalidated by his present statement. On the contrary, that statement does away with his testimony and explains his conduct, for he has now remembered or discovered that Gouhur Ali's succession is a bar to his own reversion.

Nor must it be forgotten that Gouhur Ali was put in possession of the property by the decision in the Miscellaneous Department of 1850, upheld in appeal by the Sudder Court in 1851, in the face of some opposition; though we perceive that the plaintiffs certainly did not lose much time in bringing a regular suit to vindicate their rights and to annul the summary award.

An important omission of the plaintiffs to make out a certain part of their case, must also not be forgotten. After stating that the defendant's father was insane, and offering no proof thereof, they broadly stated in their plaint that Alla Rukhee cohabited viciously with one Darogah Lall Khan, an inhabitant of a place distinctly described by them, and that Gouhur Alli was the issue of this connection.

But this assertion they do not even attempt to prove by one particle of evidence, though, after the order of the Privy Council, it is obvious how much their case would have been assisted by evidence showing, not only that the appellant was not the son of Wuzeer Jan, but that there were good grounds for believing him to be the son of some other definite person.

We now come to the cases cited in the margin* and to the rules laid down for presuming or inferring legitimacy under the law of Mahomedans, which is what we have now to administer. The reasoning of their Lordships in the first case, pages 318 and 323, seem to recognise the position that evidence of consistent treatment for a period of years

* Moore's Reports, Volume III, page 316, case of Hedayet Ali.
Volume VIII, page 136, case of Mahomed Bahur.
Marshall's Reports, High Court, April 29th, 1863, page 429, case of Nawabunissa.

favors the presumption of lawful cohabitation; and though in the second case quoted (Volume VIII, page 158) their Lordships pronounced on the evidence before them against an asserted marriage and legitimacy, yet it is quite clear that they then still recognised the position of the Mahomedan Law, which lays it down that legitimation may be presumed or inferred from circumstances without proof, and without any direct proof.

The same position is laid down in the full and elaborate judgment of a Bench of our own Court of the 29th of April 1863 (Justices Bayley and Campbell).

It is true that, in the present case, there is a want of fulness and precision as to any acknowledgment by the asserted father in his life-time. But this may be ascribed to the fact that Wuzeer Jan died more than 20 years ago, and that his marriage took place about the year 1829 or 1830. It is almost unreasonable to demand more exact proof of facts so remote in time.

On the other hand, there is the testimony for appellant of several witnesses, who are not shewn to have any motive for speaking falsely in favor of legitimacy, and the acts of relatives well acquainted with the real state of things, who, against their own interests, avowed and supported his claims before this action was brought.

We thus have considered fully the onus cast on the plaintiffs to make out a fair *primâ facie* case of illegitimacy; and the weak evidence by which that onus has been discharged—evidence, which might almost have warranted us in saying that the plaintiffs had not discharged the requirements of the Privy Council, though we have preferred to go fully into the case on both sides. We have also considered the entire failure to prove a very material assertion as to the illegitimate birth of Gouhur Ali from the loins of a third party: the recognition by Fatima, the grandmother, and by her brothers, Ismail and Syud Ali: the improbability of the appellant, as we are asked to believe, being permitted, though a stranger and of unknown parentage, to be seated on the Guddi, and to be at once recognised by the Civil Court: the amount of oral evidence brought by the defendant, some of which, at least, is untainted, consistent, and trustworthy: the almost undisputed conclusions of the Judge as to the sanity and ability for cohabitation of Wuzeer Jan: and lastly, the presumptions which necessarily follow from such finding and such facts, as laid down by the highest authorities interpreting the Law of Mahomedans: and the obvious dislike of Mahomedan Lawyers to admit bastardy where legitimacy can be inferred; and, on the whole probabilities, as well as on the proofs, oral and documentary, we have arrived at the conclusion that Gouhur Ali is legitimate, and should be retained in possession of his property. This conclusion has the effect of reversing the decision of the Judge, and of dismissing the claim of the plaintiffs. Mahomed Ismail, who has been separately represented, can, of course, take nothing in this case, nor are his interests affected by our decision.

All costs to the appellant.

The 16th January 1865.

Present:

The Hon'ble C. Steer and E. Jackson, *Judges.*

Limitation—Ejectment under process of Court.

Case No. 1485 of 1864.

Special Appeal from a decision passed by Mr. J. R. Muspratt, Judge of Purneah, dated the 9th April 1864, *reversing a decision passed by the Moonsiff of that District, dated the 7th January* 1864.

Bebee Suboorun (Defendant), *Appellant,*

versus

Sheikh Golam Nujee and others (Plaintiffs), *Respondents.*

Baboos Tarucknath Sein and *Mohendronath Shome* for Appellant.

Baboo Grish Chunder Ghose for Respondents.

Quære.—Whether the one year's limitation (of suits to set aside sales in execution of decrees) under Clause 3 Section 1 Act XIV of 1859, applies to a suit brought against a person who has obtained possession of property by delivery under Section 264 Act VIII of 1859.

Mr. Justice Steer.—I think that if the defendant, the auction-purchaser at an execution sale, had applied to the Civil Court to be put in possession of his purchase under Section 264 Act VIII of 1859, and the Court had actually put him into possession and thus ousted the plaintiff, the latter would have been bound to bring his suit within one year from the date of his dispossession. A party dispossessed or sought to be dispossessed has a right to ask the protection of the Court to restrain the purchaser from dispossessing him as provided for in Section 269

Act VIII of 1859; but if his opposition is set aside, and the purchaser is put into possession, he must bring his regular suit to establish his title to the property from which he is dispossessed, within one year from the date of the order by which he is dispossessed. If a claimant resisting the entry of a purchaser into property which the purchaser alleges he has bought under a decree, must bring a suit within one year, if the Court decides that he has no right to resist. So *a fortiori* must a party who stands by, and allows the purchaser without resistance to take possession of his purchase. It is true that Section 264 Act VIII of 1859 does not say that a party, ousted by an order of delivery passed by the Civil Court, must sue for the establishment of his title within one year from the dispossession under the Court's orders; but a party who tacitly permits himsef to be put out of possession cannot be in a better position as regards the time when he ought to bring a suit to recover possession, than a man who unsuccessfully resists the right of the purchaser to deprive him of possession.

I hold, therefore, that if the defendant had been able to show that he did actually dispossess the plaintiff through the intervention of the Court acting under Section 264 Act VIII of 1859, the plaintiff would have been bound to bring his suit to establish his title to the lands from which he had been ousted, within one year from the date of the Court's order giving delivery of possession to the purchaser. But if the defendant does not allege or does not prove that the plaintiff was dispossessed in the above manner, the limitation of one year, which would apply where ouster had actually taken place, cannot apply or be even pleaded. It is not proved or even pleaded that the plaintiff was ousted under any process of Court, and the defendant, therefore, has failed in his contention that the one year rule of limitation is applicable to the plaintiff's suit.

The order of the Judge, therefore, which set aside the finding of the first Court that the one year rule of limitation did apply, is correct, though the ground assigned is not so; and this special appeal, having for its object the annulment of the order of remand, must be dismissed with costs.

Mr. Justice Jackson.—This was a suit for confirmation of the plaintiff's right and title in certain landed estate, which the defendant alleged that he had purchased at a sale in execution of decree against the plaintiff's wife. It is not shown that the defendant, after purchase, obtained possession of the estate in accordance with the provisions of Section 264 of Act VIII of 1859. But it appears that the defendant preferred a suit for arrears of rent against some of the ryots on the estate, and obtained a decree notwithstanding the intervention of the plaintiff, who, thereupon, instituted this action.

The first Court dismissed the plaintiff's suit as barred by limitation, on the ground that it was a suit to reverse the sale, and that it was not instituted within one year from the date on which that sale became conclusive (Clause 3 Section 1 Act XIV of 1859).

The Judge of Purneah held that the time, during which the plaintiff was occupied in prosecuting his right to the land in the rent-suit, should be taken into consideration (Section 14 Act XIV of 1859).

It is on special appeal contended that the Section in question is not applicable.

It appears to me that both Courts are in error in applying Clause 3 Section 1 Act XIV of 1859 to the case. It is not sought by the plaintiff to set aside the sale. The plaintiff alleges that the estate which has been sold belongs to him, and the debtor, whose interests the defendant represents, had no right, title, or interest in the estate. The plaintiff admits that the sale was not in any way irregular, that it was properly conducted in execution of decree, and that the defendant purchased whatever rights the judgment-debtor held in that estate; but alleges that the purchaser bought nothing as the debtor held no such rights. In such a case it is not necessary for the plaintiff to sue to set aside the sale, and he has not done so. He has sued for the confirmation of his right and possession in the estate; and the only question between the parties is that on the merits.

The judgment of the Judge must, therefore, I think, be reversed; but his order remanding the case for trial on the merits will stand confirmed.

The 16th January 1865.

Present:

The Hon'ble C. Steer and E. Jackson, *Judges.*

Deposit (Recovery of).

Case No. 2575 of 1864.

Special Appeal from a decision passed by the Officiating Judge of Nuddea, dated the 28th April 1864, affirming a decision

passed by the Principal Sudder Ameen of that District, dated the 24th July 1863.

Chunder Shikher *alias* Ramgopal Bhowahy (Plaintiff), *Appellant*,

versus

Gyetree Debea (Defendant), *Respondent*.

Baboos Baneenath Bose and *Romanath Bose* for Appellant.

Baboo Mohendro Loll Seal for Respondent.

Suit for recovery of Company's paper. The Judge having found the plaintiff's ownership and its deposit with the defendants, the latter were bound either to account to the plaintiff what they had done with his paper, and to prove that they had a right to retain it; or to return the paper or its value to the plaintiff.

THIS is a suit to recover from the defendant, Oomesh Chunder Roy, and his wife, Gyetree Debea, two Promissory Company's Notes for rupees 1,000, which the plaintiff, Ram Gopal Bhowany, alleges that he placed in deposit with them. The defendants do not give any distinct answer to the plaintiff's allegation, but in general terms deny it. It is impossible from the answer to make out whether they deny that the paper in question was deposited with them, or that it was deposited by plaintiff. The Judge, on appeal, has found that the paper was deposited with the defendants by the plaintiff, and that the paper does belong to the plaintiff; but he has dismissed the suit, because on the evidence he considers that the papers were deposited for the purpose of being negotiated by way of mortgage to enable the defendants to carry on a law-suit in which the plaintiff and his mother were concerned.

It is on special appeal said that, as the defendants have not pleaded that they have negotiated the paper, and that any obstruction exists to its return, and as it is found that the plaintiff did deposit the paper with the defendants, the plaintiff was entitled to a decree.

The difficulty in dealing with this case arises from the ambiguity as to the exact nature of the defendants' answer. It is difficult to see how the issues could be properly laid down, until the defendants had been required to give clear categorical answers as regards their receipt and dealing with the papers claimed by plaintiff. Whenever defendants deal in generalities as these defendants have, they should be summoned by the Court and personally examined. One of the defendants has died since the case commenced. The Judge on appeal did direct the other defendant to be examined, but failed to elicit any direct answer from her. Under these circumstances the denial of the defendants may be taken in the broadest sense. As to the receipt of the Company's Paper, the Judge has found that the denial is false, and that the defendants did receive it in deposit—it may be for certain purposes, and in connection with some law-suit. As to the right of the plaintiff to recover it, the presumption is that he is entitled to do so, unless the defendants can show sufficient cause against it. The defendants plead no such cause; they do not say that they mortgaged it to raise a loan, or that they sold it to meet expenses of the plaintiff's law-suit with his concurrence. It does appear that they have negotiated it. But, whatever they may have done, they are bound in this suit either to account to plaintiff what they have done with his paper, and to prove that they have a right to retain it either for the present or for all future time; or to return the paper or its value to the plaintiff. The Judge, having found the plaintiff's ownership of the paper and its deposit with the defendants, must decree the plaintiff's right to recover, unless sufficient cause to the contrary is not only pleaded by defendants but proved. It by no means follows that, because plaintiff deposited the paper with defendants for the purpose of a law-suit, that the plaintiff is not entitled to recover that paper. The Judge's decision must be reversed, and the case remanded to him for disposal in accordance with the above remarks. Costs of this appeal will fall on the party who ultimately loses the case.

The 17th January 1865.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges*.

Rent—Recovery of, for current year under Regulation VII 1799.—Presumption of payment of, for prior years.

Case No. 2340 of 1864.

Special Appeal from a decision passed by the Deputy Commissioner of Hazareebagh, dated the 28th April 1864, *reversing a decision passed by the Moonsiff of*

that District, dated the 31st January 1863.

Thakoor Mirtherjeet Singh (Plaintiff), *Appellant,*

versus

Choker Narain Singh (Defendant), *Respondent.*

Baboo Prosunno Coomar Sein for Appellant.

Baboo Khetter Nauth Bose for Respondent.

Under Regulation VII of 1799 a plaintiff could only suit for and recover the rent of the current year. No legal presumption arises from his having done so, that the rent of prior years had been satisfied.

THIS was a suit for arrears of rent for a period extending from 1258 to 1269 B. S., with the exception of the year 1262, for which rent had been recovered by a separate suit under the provisions of Regulation VII of 1799.

The Court of first instance decreed the plaintiff's claim.

The Deputy Commissioner of Hazareebagh modified this decree, and gave rent from 1263 to 1269 without interest or costs.

We think that the Deputy Commissioner was clearly wrong in raising the presumption that because the rent of 1262 was recovered by a summary suit, it must be inferred that the rent for the years from 1258 to 1261 was not in balance. When the suit was brought for the rent of 1262 B. S., the only summary law for recovery of rent then in operation was Regulation VII of 1799; and under that Regulation, the plaintiff could only sue for the rent of the current year. In having done so, no legal presumption arises that the rent of prior years had been satisfied. The fact is that the defendants were ready to pay the rents, but required receipts acknowledging them to be shareholders; whereas the plaintiff alleges that they hold the villages in suit as maintenance, paying a certain small sum as quit-rent through him, the elder branch of the family, to the zemindar.

We reverse the decision of the Deputy Commissioner, and restore that of the Court of first instance. The plaintiff will recover the principal of the sum claimed without interest, as the rent was not withheld, and he unnecessarily delayed in seeking his remedy. Costs in proportion in all the Courts payable by the respondents without interest.

The 18th January 1865.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Trust—Conviction for Felony.

Case No. 308 of 1864.

Regular Appeal from a decision passed by Baboo Grish Chunder Chowdhry, Principal Sudder Ameen of Beerbhoom, dated the 11th July 1864.

Khoodeejan-nissa Bebee, one of the (Defendants), *Appellant,*

versus

Afsur Hossein *alias* Tincowry Mya (Plaintiff), and the rest of the Defendants, *Respondents.*

Mr. G. C. Paul and *Baboo Mohinee Mohun Roy* for Appellant.

Baboos Prosunno Coomar Bose and *Oprokash Chunder Mookerjee* for Respondents.

Suit laid at rupees 25,046-7-6-1-2.

Unless a plaintiff, who alleges that he gave the property sued for to the defendant in trust, makes out at least a *primâ facie* case of trust, he is not entitled to call upon the defendants for their defence, or to get a decree merely because the defendants fail in proving the case set up by them.

THE appellant in this case was the principal defendant in the lower Court. The plaintiff, Afsur Hossein, sued to recover possession with mesne profits of certain lands. His case was that he and the defendant, Azhur Hossein, being entitled to certain property in equal shares, he made over his share to Khoobun-nissa, the wife of Azhur, to be held in trust for him (Afsur); that this trust was created by him on the occasion of his and his brother Azhur being arrested on a charge of Forgery; that they were tried on this charge in the Supreme Court and convicted in 1848, and sentenced to 14 yeas' transportation; that while undergoing the sentence at Mergui, Khoobun-nissa forwarded to him money out of the proceeds of the trust property; that on his return from transportation in 1862, Khoobun-nissa had died, and her daughter, Khoodeejan-nissa, the appellant, was in possession, and he applied for what he was entitled to, but she refused to give up any thing alleging that the plaintiff had sold his share to Khoobun-nissa, and that she had made a gift of it to her (Khoodeejan-nissa).

The defence set up is that 3 or 4 years prior to the conviction for Forgery, plaintiff sold his share to Khoobun-nissa for three

thousand rupees; and that she and the appellant claiming under her, have been in possession for more that 12 years, and that there never was any trust whatever.

To prove his case, the plaintiff called certain witnesses, who deposed that, at the time that the plaintiff was arrested, he told Khoobun-nissa that he left his property in her charge. He also put in evidence certain letters addressed to him and his brother Azhur, while they were at Mergui, in which letters sums of money were remitted to the two brothers by one Imanuddeen, a friend of the family. He also relied on certain letters written by one Lutf Ali Rohoman *alias* Kodhoo Meah, on behalf of Khoobun-nissa, to her husband, while the brothers were under transportation; and he further relied on the evidence of persons who spoke to his having himself remained in possession of his share up to the date of his arrest.

The defendants did not produce the bill of sale, which they say was given to Khoobun-nissa; but they attempted to prove the kubala, and the possession under it by the testimony of witnesses. They also put in a petition filed by the plaintiff and his brother Azhur in the Court at Mergui, in which they distinctly allege,—Afsur, that he had sold his share to Khoobun-nissa for 3,000 rupees; and Azhur, that he had given his share to her. This petition was verified by the Assistant Commissioner in charge of the Jail of Mergui, and was sent up by Afsur and Azhur to the Magistrate and Collector of district where the lands in question are situated, in order to support an application for mutation of names in the Collector's registry, the object being to have the name of Khoobun-nissa substituted for those of the brothers.

The lower Court considered it proved that Khoobun-nissa did not purchase the plaintiff's share, and that the share had been made over to her as a trust; and judgment was given for the plaintiff. Hence the present appeal.

We take an entirely different view of this case from that taken of it by the lower Court, whose decision is, in our opinion, erroneous and very unsatisfactory. It appears to us that the plaintiff has wholly failed to prove his case, and that his suit ought to have been dismissed without any reference to the defence set up. The plaintiff's case is that he gave this property to Khoobun-nissa *in trust*. Unless he can establish the trust, he has on the face of his plaint no cause of action, and no right to come into Court at all. And unless he makes out at least a *primâ facie* trust, he certainly is not entitled to call upon the defendants for their defence, or in any way to look to or rely on the defence set up by them as he has attempted to do. We think he has not made out even a *primâ facie* case of trust. It is not alleged even that any *deed* of trust was executed, or that any writing took place at the time the trust was created. The direct evidence of the creation of the trust is to be found in the depositions of two or three witnesses, who say, that, being present in 1848 when Afsur was arrested, and was about to be carried off by the Police on the charge of Forgery, they heard him say to Khoobun-nissa that she was to take charge of his property and manage his affairs. The other evidence to support the trust consists of the letters above referred to, alleged to have been sent by Imanuddeen and Khoobun-nissa, and remitting money to Azhur and Afsur while undergoing their sentence. As to these letters, we have to remark that some of them, which purport to be written by Khoobun-nissa or by her authority, have not been proved, and are therefore inadmissible; while of the remainder, which are proved and are in evidence, not one contains, in our opinion, any admission or recognition of *any trust*, properly so called, for the plaintiff. It may be that, the brothers being in transportation together, it was known and intended that both should benefit by the remittances made; but Azhur was the husband of Khoobun-nissa, and there is nothing in the letters inconsistent with the view that the remittances were made by her to him only. The letters, in fact, leave the case exactly where it was, so far as the existence of any trust is concerned. There remains, thus, no proof of the trust, save the statement of the witnesses who deposed to what passed at the time of the arrest. We consider this evidence perfectly unreliable, and not such as would justify any Court in finding, as a fact, that a trust was treated. There is, of course, no difficulty in producing in Court witnesses who will say that they heard Khoobun-nissa told to look after the property. But we decline to believe such evidence when we bear in mind that, at the time the plaintiff is supposed to have given to her this direction, and to have made over to her all he possessed, he had his own wife and child with him in the same house; and when we further bear in mind that the plaintiff, who alleges that he created this verbal trust in his brother's wife rather than in his own

wife, does not come forward in person to be examined as a witness and to support his own case, but relies solely on the statements of alleged by-standers, who heard what he said. Even, however, if the plaintiff had made out a *primâ facie* case of trust, that case would have been entirely overthrown by the petition sent up by him and Azhur from Mergui. As to the authenticity of that petition, there is no doubt; and there is as little that the plaintiff, at the time it was sent up, knew what it contained; for the brothers being both prisoners; they had to deliver their petition to the Assistant Commissioner, and his letter shows that he received and forwarded the petition for them. The distinct statement made by the plaintiff in that petition, that he had sold his share to Khoobun-nissa for 3,000 rupees, goes much farther than merely to upset a *primâ facie* case of trust such as the plaintiff attempted to prove. It matters nothing whether the statement made by the plaintiff in that petition as to his having sold to Khoobun-nissa was true or false; for if parties choose to come into the Courts and make false statements, they will be bound by them if they are afterwards brought up against them, and they have no reason to complain if they are so bound.

We express no opinion whatever on the merits of the defence, or of the appellant's title to the property in dispute. We merely find that the plaintiff has made out no case, and, therefore, order his suit to be dismissed. But had a trust been clearly established in Khoobun-nissa, a further very serious question would have arisen as to the plaintiff's right to recover—the trust being one created for the patent purpose of avoiding the consequences of a conviction for felony, and the forfeiture of property ensuing thereon. Indeed, from the facts which have appeared in the course of this case (although the defendants for manifest reasons kept out of sight all questions connected with the forfeiture, and by no means rested their defence upon that ground). it seems not improbable that, on the conviction, the whole of the property of the brothers, vested in Khoobun-nissa, might have been claimed by the Crown.

Appeal allowed with costs.

The 18th January 1865.

Present:

The Hon'ble C. Steer and E. Jackson, *Judges.*

Damages—Onus probandi (Illegal omission)—Sale (in execution of decree)—Notice of Sale—Costs.

Case No. 267 of 1864.

Regular Appeal from a decision passed by Baboo Greesh Chunder Ghose Roy Bahadoor, Principal Sudder Ameen of the 24-Pergunnahs, dated the 18th April 1864.

Kassee Nauth Roy Chowdhry (Plaintiff), *Appellant,*

versus

Hullodhur Roy and others (Defendants), *Respondents.*

Baboos Kishen Kishore Ghose, Obhoy Churn Ghose, and *Kedar Nauth Mozoomdar* for Appellant.

Mr. A. F. Lingham, and *Baboos Hem Chunder Banerjee, Kedar Nauth Chatterjee,* and *Baney Madhub Banerjee* for Respondents.

A plaintiff who seeks damages on the ground of an illegal ommission to give him notice of the sale of his property in execution of a decree, in accordance with Section 216 Act VIII of 1859, is bound to show that there was such an illegal omission.

A Judge is not required by law to give notice, at the the time of the sale, of the amount of the decree to be sold; and his omission to do so does not constitute an irregularity in the sale entitling the plaintiff to claim damages under Section 252 Act VIII of 1859.

Members of the same family and living in the same place, when sued together on a cause of action common to all, are entitled to only one set of costs.

THE plaintiff was a judgment-debtor to the defendants. The latter took out execution of their decree for the costs of suit due to them, and the plaintiff paid up the amount. Subsequently the defendants took out execution for the amount due to them under the decree for wasilat, and put up to sale a decree No. 51 passed in favor of the plaintiff, and the same was bought by a stranger for 3,205 rupees. The plaintiff alleges that this sale was irregularly conducted; no notice of the sale was given to him in accordance with Section 246 Act VIII of 1859; and the amount of the decree No. 51 was not stated in the proclamation of sale. On these accounts the plaintiff avers that he has suffered a loss by the sale of his property for a sum much under its value; and he sues the defendants, therefore, for damages, laying his claim at 19,185, rupees.

The Principal Sudder Ameen thought that the omission to serve the plaintiff with a notice was not an irregularity in the conduct of the sale, for which the law gives the

party aggrieved by the sale an action for damages; and that the value of the property to be sold was not necessary to be stated in the sale proclamation. He considered also that these omissions were not creative of any loss on the part of the plaintiff; and on these grounds he dismissed the suit, giving each of the defendants separate costs.

When execution was first taken out, every thing seems to have been done regularly, and the amount then actually due under the decree was paid up, and the execution case was struck off the file on the 29th December 1860. On the 31st December 1861 a fresh application was made for execution for recovery of the mesne profits; and, inasmuch as no notice of this application was given to the plaintiff, his contention is that the sale was irregular, and that he had no opportunity of paying up the amount and saving his property. If the application had been made two days earlier, there is no manner of doubt that notice would not have been necessary, inasmuch as between the date of the application and the last order in the case, which was on the 29th December 1862, a year would not have elapsed.

But there is reason to think that proceedings in execution were carried on during 1861, for we are told that when the plaintiff paid up the amount for which execution was first applied, there was nothing more to pay *at that time*. Subsquently the amount for which the plaintiff was liable in mesne costs was ascertained, and a further sum became payable. Now, we are not told anything as to to the dates when these proceedings for the purpose of ascertaining the amount of the mesne profits were instituted. If these proceedings were in regular progress, and were not completed a whole year before the second application for execution was put in, then a notice was not necessary under Section 216. We must presume that, in dealing with this second application, all things were done in regular order; and that, if a notice had been necessary, a notice would have been served. It is for the plaintiff, who seeks damages on the ground of a legal omission to show that there was such an omission. He has not done so, for he has not shown when the proceedings in execution with a view to determine what the amount of wasilat was which was due from him, terminated; and it is on the ground of those proceedings terminating a year before the second application for execution of decree was put in that it depends whether a notice was necessary or not.

With respect to the second omission, we agree with the Principal Sudder Ameen in thinking that the law (Section 249 Act VIII of 1859) does not require that the amount value of the property to be sold should be stated in the sale proclamation. If it was of consequence to the plaintiff, and to the success of the execution sale that the amount of the decree to be sold should be announced at the time of the sale or previously, he might have petitioned the Judge to make the announcement. But the Judge was not required by law to give notice; and, therefore, his omission to do so does not constitute an irregularity in the sale such as to entitle the plaintiff to claim damages under Section 252 Act VIII of 1859.

On the point as to how the costs of suit have been awarded by the Court below, we think that, considering all the defendants are members of the same family, and live in the same place, they are sued on a cause of action common to all, and that they decidedly put their heads together as to the defence, for they answer in exactly the same words. We think they have unnecessarily augmented the costs by each filing a separate answer, and each employing a separate vakeel, when one answer and one vakeel would have sufficed. On these grounds we think the defendants are entitled only to one set of costs between them. We affirm the decision of the lower Court, dismissing the plaintiff's suit; but in modification of the order of the lower Court, we declare the plaintiff liable to costs to the other side to the extent he would have been liable, had the defendants joined together to make one defence and had employed only one vakeel. Each party will pay his own costs of this appeal.

The 19th January 1865.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Application for review (Revival of).

Special Appeals from a decision passed by the Principal Sudder Ameen of Hooghly, dated the 26th May 1864, *reversing a decision passed by the Moonsiff of that District, dated the* 17*th August* 1860.

Case No. 2357 of 1864.

Needoo Monee Dossee (Plaintiff), *Appellant,*

versus

Saroda Monee Dossee and others (Defendants), *Respondents.*

Case No. 2358 of 1864.

Doorganath Shoor and others (Plaintiffs), *Appellants,*

versus

Sookhmoy Biswas and others (Defendants), *Respondents.*

Baboos Anund Chunder Ghossal and *Kedarnath Chatterjee* for Appellants.

Baboos Dwarkanath Mitter and *Khetturnath Bose* for Respondents.

After an application for a review of judgment has been struck off, a second application may be admitted.

ONE decision governs these two appeals. The past history of the suit is somewhat curious. The plaintiff's (special appellant's) suit was decreed on the 17th August 1860. This decision was affirmed by a former Principal Sudder Ameen, Baboo Oopendur Narain Nyaruttun, on the 22nd July 1862. The defendant applied for review of judgment on the 28th November 1862. The present Principal Sudder Ameen, Moulvie Naziroodeen Mahomed, struck off the application, because the pleaders were not present. On the 29th December 1863, a second application was made to revive the review. This application was complied with, and the original decision of the Moonsiff was reversed on the 26th May 1864.

The grounds of special appeal are that the Principal Sudder Ameen was wrong in reviving the application for review which had been struck off for default, the Code of Procedure nowhere providing for the exercise of such power by the Appellate Court; and that, if the Court below had no power to restore the application, the judgment pronounced by it is illegal, and must be reversed, and the decision of the former Principal Sudder Ameen restored.

We have referred to the record of this case, and have no doubt that the order admitting the petition of review was a just and proper one, inasmuch as the former Principal Sudder Ameen had committed a grave error in his judgment in stating that the petitioner had not filed certain material documents bearing on the merits of the case; the fact being that those documents were on the record. We have now to consider whether the order reviving the application for review after it was struck off, was illegal. There is no provision in the Code of Procedure for or against such a proceeding; but we find that a Divisional Bench of this Court has ruled that "under the law a second application for review can be admitted," (*See* Decision dated 8th December 1864, No. 1395 of 1864, Fukeeroodeen and another, plaintiffs, appellants, *versus* Kalachand Sircar and others, defendants, respondents).

We dismiss these appeals with costs and interest.

The 19th January 1865.

Present:

The Hon'ble G. Campbell and E. Jackson, *Judges.*

Sale by second attaching creditor—Delay of first.

Case No. 2068 of 1864.

Special Appeal from a decision passed by the Principal Sudder Ameen of Bhaugulpore, dated the 20th May 1864, *affirming a decision passed by the Sudder Ameen of that District, dated the 27th January* 1864.

Mohunt Naunk Buksh (Plaintiff), *Appellant,*

versus

Koonwur Roy (Defendant), *Respondent.*

Baboos Anund Gopal Paleet and *Parbutty Coomar Mitter* for Appellant.

None for Respondent.

A sale by the second attaching creditor cannot be set aside at the suit of the first, who after attachment, delayed to proceed to a sale.

PLAINTIFF attached certain property in execution of decree, but delayed proceeding to sale. Meantime, another creditor attached and proceeded to sale. Subsequently, the first attaching creditor caused the same rights to be sold a second time; and having bought the rights at that sale, he now sues the purchaser at the other sale for the property. We think that the Courts below have rightly dismissed the claim. The first creditor, who attaches, cannot prevent any other creditor from proceeding in execution; and the sale to the defendant was perfectly regular and valid. Plaintiff could only claim the benefit of Section 270, that is, the right to be first paid out of the proceeds. His attempt to set aside the sale to the defendant is wholly unwarranted, and we dismiss the appeal.

The 19th January 1865.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Deposit (Recovery of, under verbal contract)—Evidence.

Case No. 252 of 1864.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Sarun, dated the 20th April 1864.

Manickram and another (Defendants), *Appellant,*

versus

Ramyad Ram (Plaintiff), *Respondent.*

Mr. E. T. Allan and *Baboo Dwarkanath Mitter* for Appellants.

Baboos Kishen Succa Mookerjee and *Unnodapersad Banerjée* for Respondent.

The plaintiff alleging a verbal contract by the defendants to satisfy the plaintiff's creditors under a deposit of certain goods to be restored on demand or at a fixed date, sued for their restoration. HELD that mere payment by the defendants to one or two creditors without distinct proof of the contract, could not entitle the plaintiff to a decree, particularly when it was in his power to tender his own evidence or to examine the defendants, and he did neither.

PLAINTIFF filed his plaint on the 9th December 1863. In it he states that he asked the defendant to hold in deposit his cash and goods, "and mediate between me and my creditors, whose debts you will be pleased to satisfy."

The plaint then proceeds,—"The defendant satisfied two creditors, one of them being an inhabitant of Betiah, and the other Ram Pertab of Chupra, by payment of rupees 1,412-8 and rupees 127-10.

Defendant's case was a denial altogether of plaintiff's claim as a false one.

The lower Court found that the two creditors had been paid, that if the defendants had not agreed to pay the creditors of the plaintiff, they would not have paid these two.

The lower Court further finds that the chittas, receipts, and sutta (memorandum by way of receipt) filed by plaintiff, were really given by defendants, and that plaintiffs filed their account-books at once with these items in them; while defendants were dilatory in producing their books, and when they did, the accounts so filed appeared "recently engrossed on old papers," were few and for irregular periods, and had "filed a few sheets having entries which are false."

All of these points in the decision below are contested in the petition of appeal before us. It is further urged that plaintiff, under the ordinary rules of pleading, must prove his allegation that defendants had undertaken on the deposit of cash, jewels, and saltpetre, to satisfy plaintiff's creditors on plaintiff's bankruptcy.

The first thing for us to decide is whether plaintiff proved this? There is no written contract with such a stipulation. The chittas and suttas filed, are totally silent as to any thing but the mere receipt of the articles specified. Then as to the oral testimony on this point. Two witnesses only, Chonee Loll and Gopal Ram, depose that the jewels, cash, and saltpetre were deposited in order that defendants might carry on plaintiff's business. If the oral testimony of these witnesses was otherwise satisfactory and reliable (which we do not think it is), still the bare statement to the above effect would not prove plaintiff's allegation that defendants contracted to satisfy plaintiff's creditors. It is argued that two creditors were shown by the evidence to have been paid; and thus the fact of the defendants having undertaken to satisfy the plaintiff's creditors is to be presumed. We think this payment to one or two creditors without any further evidence of the contract than that which has been above referred to, as all that there is, does not suffice.

It is now further pleaded here that the chittas, suttas, and oral testimony as to the fact of the deposit is sufficient to prove that plaintiff placed the property specified in the schedule of the plaint with the defendants as a deposit; and plaintiff has a right to have it restored to him on this action, unless defendants can prove some right to it, which defendants have failed to do. Here, again, we must remark that plaintiff is bound to prove this allegation that it was a deposit, *i. e.*, that plaintiff placed the property specified in defendants hands on a contract with defendants that the latter would restore it on demand or at a fixed time.

There is no evidence of any such contract. The evidence to any contract is totally wanting, as we have already noticed.

Lastly, it is urged that the receipt by defendants of the goods is proved, and that they should, therefore, account for them to plaintiff. It is added that the transfer of this property by plaintiff as shown by his witnesses is recorded in the plaintiff's books of accounts, while defendants' books of accounts, chittas, and suttas are not reliable for the reason given by the Principal Sudder Ameen, and before mentioned by us. We have already stated that the chittas and suttas mention the bare receipt of the goods, and

that the evidence as to a contract is insufficient altogether. But we may now add that the oral testimony of the witnesses, Choonee Lall and Gopal, seems to our minds to bear an appearance of being tutored, and to be contradictory in one or two independent and essential points, such as who was the writer of the sutta. The plaintiff's witnesses, Preoz Rai and Sooni Rai, whom plaintiff represents to have paid in certain sums in cash are not examined, and the evidence of the others neither proves a contract by defendants to satisfy plaintiff's creditors under a deposit to be restored on demand or at a fixed date, nor satisfactorily that the goods were delivered in any such way as to give plaintiff a right to their restoration by a decree in this suit. It is quite within the power of the plaintiff to tender his own evidence or to examine defendants, and he did neither. On this point we fully concur in the remarks of this Court in page 183 of Marshall's Reports, Vol. I:—

"If parties will not come forward and "give their own evidence in cases in which "such evidence is most important and the "best that can be obtained, they must not "complain if their written statement verified "by their mooktears and not by themselves, "and supported by the evidence of menials, "and a class of witnesses of whom any num- "ber can be obtained to prove any fact that "is wanted, are not believed. The Court "will require the best evidence to be given, "and will not be satisfied with the evidence "of inferior witnesses put forward by the "parties themselves, while they remain in "the back ground and plead their prejudices "as an excuse for their absence. As this "rule comes to be more generally acted upon, "fewer false causes will be put forward and "the occupation of hired witnesses be gone."

Under this state of the case, it is not for us to do what we are now pressed to do, *viz.*, consider the weakness of defendants' pleas and proofs. We repeat that the plaintiff must, in such a suit as this, ordinarily prove his allegations before he can ask defendants to go into their case. We, accordingly, do not think it proper to go into defendants' case.

We accordingly decree this appeal, and dismiss plaintiff's suit with costs. But we cannot conclude this judgment without noticing the fact that neither the Court, nor the plaintiff's pleader, nor defendants seem to have asked the witnesses a single question, as if the object of the Court as well as of the parties was not to elicit the truth, but to let it be kept back.

The Principal Sudder Ameen is, in our opinion, much to blame for this.

The 20th January 1865.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Bona fide mortgage without notice, after foreclosure—Arrangement between mortgagor and other parties.

Case No. 2211 of 1864.

Special Appeal from a decision passed by Baboo Gunga Churn Shome, Principal Sudder Ameen of Dacca, dated the 11th May 1864, affirming a decision passed by the Moonsiff of that District, dated the 26th August 1863.

Ram Doolub Day (Plaintiff), *Appellant,*

versus

Mohanund Dutt (Defendant), *Respondent.*

Baboos Anund Gopal Paleet and *Romesh Chunder Mitter* for Appellant.

Baboo Chunder Madhub Ghose for Respondent.

A *bonâ fide* mortgagee without notice, who has foreclosed, is not affected by any arrangement between the mortgagor and other parties.

RAMDOOLUB DAY, plaintiff, sued for the property involved in this case on the allegation of a mortgage by conditional sale for valuable consideration from Mohanund, defendant, which mortgage has been duly foreclosed. Mohanund is stated in the judgment of the first Court *not* to have objected to the claim of the plaintiff. One Trilochun, a co-parcener, however, intervened, and contested plaintiff's right on the ground that he and Mohanund had, about two years before the mortgage, entered into an agreement which was sanctioned by a decree of a Court, to the effect that the property in suit should not be sold by Mohanund to any one other than Trilochun.

Both the lower Courts held that the plaintiff's mortgage was *bonâ fide*, and there is no evidence of his having had notice of Trilochun's alleged agreement with Mohanund. But the Courts have considered these stipulations to invalidate plaintiff's right so far that they have decreed that Trilochun may obtain possession if within a certain fixed time he pays the plaintiff what is due on his mortgage; but that, failing such payment by Trilochun, the plaintiff is to have possession as prayed for by him.

The special appeal is to the effect that plaintiff, as *bonâ fide* mortgagee without notice who has foreclosed, is not affected by any arrangement made between defendant Mohanund and other parties; *but* that the mortgage must stand. Trilochun may, if so advised, have his remedy against Mohahund.

We are of opinion that the objection is, in law, sound and valid; and that, in the absence of any evidence of plaintiff having entered into the mortgage with notice of the prior arrangement with Trilochun, plaintiff is entitled to a decree. In no possible event could the decree of the lower Court be right, because, if the agreement with Trilochun invalidated the mortgage to Mohanund, the latter took nothing by his mortgage, and Trilochun was under no legal obligation to satisfy. If, on the other hand, the mortgage was under the circumstances not affected by the prior alleged agreement with Trilochun, the plaintiff was entitled to the possession he sought.

We, accordingly, reverse the decision of the Principal Sudder Ameen, and decree this appeal with costs.

The 20th January 1865.

Present:

The Hon'ble C. Steer and E. Jackson, *Judges.*

Suit against Security for appearance of defendant.

Case No. 1386 of 1864.

Special Appeal from a decision passed by Major W. Agnew, Judicial Commissioner of Assam, dated the 8th March 1864, *reversing a decision passed by Lieutenant A. E. Campbell, Officiating Deputy Commissioner of that District, dated the 23rd December* 1863.

Sikooram Agurwalla (Plaintiff), *Appellant,*

versus

Komolakant Dey (Defendant), *Respondent.*

Baboos Bhugobutty Churn Ghose and *Rajendro Misser* for Appellant.

Baboo Mohinee Mohun Roy for Respondent.

A suit against a security for the appearance of the defendant in a former suit is not affected by Section 11 Act XXIII of 1861, the parties to the former suit and the cause of action being different from those in this suit.

THIS was a suit against the defendant who became security, under Section 76 Act VIII of 1859, for the appearance of a defendant in a former suit, and who, on that defendant's absconding, gave a bond payable in two instalments for the amount due under the decree against that defendant. The suit is founded on that bond. The Judicial Commissioner of Assam, reversing the decision of the Deputy Commissioner, has held that the suit cannot be entertained, Section 11 Act XXIII of 1861 laying down that all questions arising between parties to a suit in which the decree was passed, and relating to the execution thereof, shall be determined by order of the Court executing the decree, and not by separate suit.

It is said that the parties to this suit are not the same as the parties to the former suit, and that the cause of action differs, the former action being founded on the bond given by the defendant in that suit, the latter on the bond given by another party, *viz.*, the security who is the defendant in this suit.

We think this objection is valid. The parties in the two suits are not identical, and the bond, on which the suit is brought, is not the same as that on which the former suit was brought.

The Judicial Commissioner's judgment is reversed, and the case remanded for trial on the remaining issues which arise on it.

The 20th January 1865.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice,* and the Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Limitation (Exemption from operation of)—Summary and interlocutory proceedings in another suit.

Case No. 68 of 1864.

Regular Appeal from a decision of Baboo Koylash Chunder Deb Roy Bahadoor, Second Principal Sudder Ameen of the 24-Pergunnahs, dated the 18*th December* 1863.

Ramgopal Roy and another (Plaintiffs), *Appellants,*

versus

Chunder Coomar Mundul and others Defendants), *Respondents.*

Mr. J. Cochrane and *Baboos Mohendro Lall Shome* and *Khetter Nanth Bose* for Appellants.

Messrs. R. T. Allan and *R. E. Twidale,* and *Baboos Anund Gopal Puleet, Dwarkanath Mitter, Unnoda Pershad Banerjee*

Kalleprosunno Dutt, and *Baney Madhub Banerjee* for Respondents.

The plaintiffs, as heirs of Ramtonoo the husband of one Bhugobuttee, more than 12 years after her death, sued to recover lands alienated by her. As an answer to the plea of limitation they alleged that in a suit for other property brought against Bhugobuttee in her life-time, they presented a petition after her death praying to be allowed to appear as her representatives, and were opposed by one Beharry Loll claiming to be an adopted son of Ramtonoo; that in March 1847, and within 12 years before suit, the Principal Sudder Ameen ordered the plaintiffs' names to be substituted for that of Bhugobuttee as defendants in that suit. HELD by the majority of the Court *dissentient* Glover, J.) that these proceedings did not bar the operation of the old law of limitation (Section 14 Regulation III of 1793).

Mr. Justice Glover.—THE plaintiffs in this case sued as heirs of one Ramtonoo to recover the family property in which Ramtonoo's widow, Bhugobuttee Dassea, held a life-interest. Bhugobuttee died on the 26th of Cheyt 1252 B. S.; but plaintiffs, on endeavouring to take possession of the property, were resisted by the defendants who claimed under a mortgage granted by the widow on the 21st of July 1824 and foreclosed by a decree of the Supreme Court on the 25th of June 1827. The particulars of the suit are given in the judgment of the High Court, dated 30th March last.

The Principal Sudder Ameen, before whom the case was originally tried on the 21st of September 1860, held that he had no jurisdiction, and did not adjudicate either on the point of limitation or on the merits. He considered that, as the mortgagee's rights had been upheld by the Supreme Court, the Zillah Courts could not interfere nor set aside the mortgage, even though the alienations by the widow were subversive of the reversioner's rights. On appeal to this Court, however, the Principal Sudder Ameen's decision was reversed, and he was directed to try the case *de novo*,—*first*, as regards the limitation pleaded by defendants, and *secondly*, if necessary, on the merits (High Court 30th March 1864, Bayley and Campbell, J. J.).

On the remand, the Lower Court held that as Bhugobuttee Dassea was admitted by the plaintiffs themselves to have died not later than the 26th of Cheyt 1252 B. S., a period of 11 years 11 months and 25 days had elapsed before the present suit was brought; and that, therefore, in accordance with the decision of the Privy Council in the case of Maharajah Koonwar Baboo and another *versus* Nundo Lall Singh (Moore's Indian Appeals, vol. VIII part II page 199), the plaintiffs were bound to give full and satisfactory proof of the date on which their cause of action arose; and as plaintiffs had not been able to give such proof that Bhugobuttee Dassea died on the 26th of Cheyt 1252 (a fact traversed by the defendants who alleged that she died in the preceding month of Maugh), this case was barred by limitation.

This is the only point for consideration in this appeal.

Mr. Cochrane, appellants' Counsel, only very faintly contested the point of limitation as argued before the Principal Sudder Ameen. Indeed, he almost admitted that, if the limitation time were to be counted from Bhugobuttee's death, the ruling of the Privy Council in the case above alluded to would put him out of Court. But he argued that the 12 years for bringing this action could not be counted from the date of Bhugobuttee Dassea's death, but from the 31st of March 1847, when the final order regarding the substitution of appellant's name for hers was passed.

It appears from the record that, during Bhugobuttee Dassea's life-time, a suit was brought against her and others, by one Bhyrub, to recover possession of 17 cottahs of land under a bill of sale. Bhugobuttee Dassea died "*pendente lite*;" and the appellants in this suit, as the heirs-at-law of her husband Ramtonoo, filed a petition in the Civil Court, praying to be substituted in Bhugobuttee's place amongst the defendants in the case brought by Bhyrub. This petition was filed on the 1st of May 1846. On the 22nd of the month following, the application was opposed by *Behareelall Ghose*, who called himself Bhugobuttee's adopted son, and as such claimed to represent her. The Principal Sudder Ameen at first rejected both applications; but, on appeal to the Judge, he was directed to weigh the respective claims of both parties, and substitute one of them in Bhugobuttee Dassea's place. He then decided that there was no sufficient proof of Gooroopershad's adoption, and that the present appellant's claims as heir, were superior; he therefore ordered them to act as Bhugobuttee's representatives, and defend the suit. This order was given on the 31st March 1847, and it appears further that Bhyrub's claim was dismissed on the 5th of April 1848.

Mr. Cochrane contended that this was a case in which appellants' rights as heirs-at-law of Bhugobuttee Dassea were in suit; and that as, until these rights were determined, they had no "*locus standi*" (for,

had Behâreelall Ghose's adoption been proved, the latter's right would have been superior to theirs), they were not in a position, at the time of Bhugobuttee's death, to sue the present respondents; nor were they compelled to enter into two separate litigations until the result of the first was known, as, if that were adverse, they would have incurred the expense of the second for nothing. He quoted in support of this view the cases of Rajah Enayet Hossein *versus* Syud Ahmed Reeza, page 238 vol. VII. Moore's Indian Appeals, and Pran Nauth Chowdhree *versus* Rokea Begum, page 356 of the same vol., decided by the Privy Council in 1859.

The principle of the first of these cases is, as expressly stated in the Privy Council's judgment, to be applied to the last. In that case the dispute was between a mortgagor and a party claiming as purchaser regarding the equity of redemption; and it was held that this dispute was a "good and sufficient cause" within the exception to the operation of Regulation III of 1793, why the mortgagee should not have instituted proceedings for foreclosure within the 12 years prescribed by the Regulation.

Now it appears to me that the point in the case of Pran Nauth Chowdhree is not so strong as in the appeal now before us. In that suit the two parties claiming the right to redeem the mortgage were squabbling over their respective claims; and the mortgagee, who did nothing, was declared entitled to count the time during which the dispute was pending. In this case the real point at issue was, who was Bhugobuttee's legal heir? who was entitled to succeed to the valuable property in which, from the death of Ramtonoo, she had held a life-interest? It may be, as argued by the respondents, that this was a mere summary proceeding, an interlocutory order that had no bearing on the case itself. But the result was to give the party succeeding in getting his name substituted in Bhugobuttee's room an absolute titular right over all the property in dispute until the summary award was either reversed in appeal or set aside by a regular suit. The so-called adopted son of Bhugobuttee Dossee neither appealed nor brought a regular suit, so that, as between the present appellant and him, the award was a final order, and one of the greatest possible importance.

Until it was given, appellant could not tell his own position. He was opposed by a party putting forward a claim superior to his own; and it cannot, I think, be said that, with that uncertainty hanging over his head, he was bound to commence fresh litigation against third parties, whose defence, had Gooroopershad's adoption been held valid, would have been, *quoad* himself, perfect.

I think, therefore, that the spirit of the Privy Council's judgment in the case of Pran Nauth Chowdhree applies fairly to the present appellant's suit, and I hold that the Principal Sudder Ameen's proceedings, as to the substitution of names, formed "a good and sufficient cause" so as to take the appellant's case out of the operation of the ordinary twelve years' limitation law. I think that he is entitled to count his twelve years from the date of the Principal Sudder Ameen's order, *viz.*, 31st March 1847, which, as the present suit was instituted on the 1st of April 1858, would bring him within time.

Taking this view of the case, I would reverse the order of the Principal Sudder Ameen's, and remand the suit to be tried on the merits.

Mr. Jutice Kemp.—I regret that I am unable to concur in the view taken of this case by my learned colleague.

The proceedings in the case of Bhyrub *versus* Bhugobuttee and others, on the part of the appellants in this case, and upon which their learned Counsel, Mr. Cochrane, relies as taking the present claim out of the operation of the statute of limitation which in this case is the old law, Section 14 Regulation III of 1793, are not in my opinion sufficient for that purpose.

I would premise by remarking that this proceeding of a former Sudder Ameen of the 24-Pergunnahs, Mr. J. Weston, dated the 31st March 1847, was not filed in the Court below, nor has it been filed in this Court with the permission of the Court. The proceedings in question are filed with the record of the appeal with the following "memorandum," endorsed upon the petition representing it,—"May be filed with the appeal record."

Dwarkanath Pauleet,

July 21st, 1864. 3rd Assistant."

This document must have been put in a few days before this appeal was heard. The 3rd Assistant will be called upon to explain under what circumstances he allowed this document to form part of the appeal record without the permission of the Court.

The facts of the case, in as far as they are material, are briefly as follow:—

The appellants, plaintiffs below, sue to set aside a mortgage made by Bhogubuttee Dassea, the widow of Ramtonoo, with the

consent of the nearest heir then living, to the defendants.

The mortgage was foreclosed on the 26th June 1827, and possession was given to the defendants by the Sheriff of the late Supreme Court in July 1828, from which time the defendants have been in undisturbed and undisputed possession of the properties mortgaged. The following tree will explain the position of the parties:—

Radha Churn had 3 sons—

Tara Chand, Gooroopershad, Ram Tonoo-Bhugobuttee Dossee.

Note.—Tara Chand died before the transaction.

Tara Chand and Gooroopershad died without issue. Ram Tonoo left a widow, Bhugobuttee Dossee, the mortgagor. The mortgage was executed in the life-time of Gooroopershad and with his consent, and the sum borrowed was considerable—rupees 84,000! The necessity for the mortgage is proved, *viz.*, payment of Ram Tonoo's debts and the Government Revenue, which are legal necessities.

No steps were taken by the present plaintiffs, who are the daughter's sons of Radha Churn, the common ancestor, to obtain a declaratory decree, setting aside the mortgage as invalid during the life-time of the widow or of Gooroopershad. Eleven years 11 months and 25 days after the date upon which, by the plaintiff's own shewing, their cause of action arose or from the death of Bhugobuttee, this suit is brought.

The defendants state that Bhugobuttee died more than 12 years before date of suit, or in Maug 1253, and not in Cheyt; and I am of opinion that the plaintiffs have failed to prove that Bhugobottee was alive within that period or within the five days required to complete the 12 years, and the *onus* was on them. In the Court below the plaintiffs resorted to a subterfuge to escape the limitation law; to wit, they averred that they attempted to take possession on the death of Bhugobuttee or early in 1253, and were ousted; but they wholly failed to prove this averment.

In the Court below the plaintiffs never attempted to show that there was any good and sufficient cause, such as the pendency of litigation respecting the same cause of action, which precluded them from bringing their suit at an earlier date. This line of argument is taken for the first time in this Court. The proceeding upon which their learned Counsel relies is dated the 31st March 1857.

Bhyrub Chunder sued Ramlochun Rae, Bhugobuttee, and others, for possession of 17 cottahs of land in the Court of the Sudder Ameen. Before Bhugobuttee could put in an answer, she died. A proclamation was issued, calling upon her heirs to come forward and prosecute the defence. Two parties appeared, the plaintiff in this suit and Ornopoono, the sister of Bhugobuttee, as guardian of Behareelall Ghose, who, it was alleged, had been adopted by Bhugobuttee under a deed of permission or "Onoomoteepotro" granted to her by her husband Ram Tonoo.

The plaintiffs rested their claims to be the representatives of Bhugobuttee upon the fact that they were the grandsons of Radha Churn the common ancestor, and that the adoption never took place. The Sudder Ameen rejected both their claims. On summary appeal by the present plaintiffs, the Judge ordered the Sudder Ameen to select one of the two parties, and to admit them as Bhugobuttee's representatives, and to proceed to judgment.

On the case coming again before the Sudder Ameen, he gave both parties three days to bring their witnesses for cross-examination, and to submit any further proof. The guardian of the alleged adopted son gave no proof. The Sudder Ameen, therefore, admitting the truth of the adoption, and being of opinion that the present plaintiffs were the heirs of Bhugobuttee, admitted them as her representatives for the purposes of that suit. The order admitting them is dated 31st March 1847, and the suit of Bhyrub was eventually dismissed. If the plaintiffs be allowed to deduct the time occupied in this Miscellaneous proceeding, the present suit is in time; if not, it is inevitably barred.

* Rajah Enayet Hossein, *versus* Syud Ahmed Reeza. Pran Nauth Chowdhree, *versus* Rookee Begum and others, Moore's Reports, vol. VII.

The learned Counsel in support of his argument has quoted the cases noted in the margin.* It appears to me that these cases are in no ways similar to the present case.

In the case of Rajah Enayet Hossein, their Lordships observed that the object of Regulation III of 1793 was to protect the title of parties who have been in possession under a *bonâ fide* title, or what is supposed to be a *bonâ fide* title, for the period of twelve years; but that the law was not to apply when the party had been precluded by good and sufficient cause from bringing his suit within that period. "In

the case of the Rajah Enayet there had been," to use the words of the judgment in that case, "litigation from beginning to end." In that suit the parties in possession could not rely "upon quiet and unmolested possession without notice of adverse claim." In the suit under consideration, there has been no previous litigation as to the *right of inheritance*. The possession of the defendant has been quiet and unmolested over a period of 36 years.

In the case of Pran Nauth Chowdry, the question was whether the mortgagee, Pran Nauth, was barred by limitation from proceeding to foreclose the parties entitled to redeem him. Their Lordships found that there was nothing to support an inference that the once undoubted right of the mortgagee to enforce possession was at an end, or barred, or incomplete. Further, in that suit there was protracted and active litigation between the heirs of the mortgagor and a purchaser from one of the heirs of Ramrutton Rai Pran Nauth, the mortgagee, intervened in every suit, and his rights were distinctly reserved. I cannot understand how the principle of these two cases is applicable to the case under consideration. The plaintiffs in this case have not been diligent in prosecuting their claim, nor have they been precluded by good and sufficient cause from doing so. The only steps taken by them from the death of Bhogobuttee in 1845 to the institution of the present suit in 1858, has been to file a petition in 1846, which cost them 8 annas, praying to be admitted to carry on a defence in a suit brought for a small piece of land as her representatives. The proceedings and the order* of the Sudder Ameen in that case were summary and interlocutory, and, in my opinion, did not give the plaintiffs a fresh starting point from the date of such proceedings.

* 31st March 1847. 1st April 1858, present suit.

Being of opinion that the Court should not favor parties who have been guilty of wilful laches, and that the suit of the plaintiffs is barred, I would dismiss this appeal with costs bearing interest, to be paid by the appellants.

The Chief Justice.—The plaintiffs claim as the heirs of the husband of one Bhugobuttee, who, according to the allegations of the plaintiff, died 11 years, 11 months, and 25 days before this suit. The plaintiff failed to prove the date of her death; but he alleges that, in a suit for a small piece of land which was pending at the time of the death of Bhugobuttee, he presented a petition in the year 1846, praying to be allowed to carry on the defence as her representative. One Behary Lall Ghose then set up a title as a son adopted by Bhugobuttee. But his claim was rejected by the Principal Sudder Ameen on the 31st of March 1847. With these proceedings the now defendants, who claim as purchasers from Bhugobuttee, have nothing to do. And I entirely concur with Mr. Justice Kemp in thinking that a contest carried no farther than a summary and interlocutory proceeding of this sort in another suit, was no satisfactory reason for the plaintiff not proceeding in this suit; and that he was in no way whatever precluded from obtaining redress. I think that the case does not come within the principle of Pran Nauth Roy Chowdhree *versus* Rookee Begum of Moore's Indian Appeals 323, in which, until the decision of the former suit, the plaintiff did not know who were the proper parties to be made defendants in a suit to foreclose—or Rajah Enayet Hossein *versus* Syud Ahmed Reza of Moore's Indian Appeals 238, in which the plaintiff's own title was incidentally in dispute, and actually determined by the decree in the former suit. The appeal will be dismissed with costs and interest.

The 21st January 1865.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Voluntary offering—No right of action against recipient.

Case No. 2235 of 1864.

Special Appeal from a decision passed by Moulvie Nazirooddeen Mahomed, Principal Sudder Ameen of Hooghly, dated the 17th April 1864, *affirming a decision passed by the Moonsiff of that District, dated the 29th September* 1863.

Muddun Mohun Ghossal (Plaintiff), *Appellant,*

versus

Nuboram Chuckerbutty and others (Defendants), *Respondents.*

Baboo Tara Prosunno Mookerjee for Appellant.

Baboo Mohendro Lall Seal for Respondents.

A voluntary offering may be made to any one without giving a right of action to another against the recipient.

In this case, plaintiff sues for the offerings made to those Brahmins who officiate at funerals of Hindoos; and he sues defendant, the family priest, as having improperly received those offerings, which, by usage, having the force of law, should have been given to plaintiff.

Defendant pleaded that, as family priest, he was entitled to those offerings.

The first Court held that the family Brahmin priest might receive the offering, and that the Courts could not interfere to prevent it. It, therefore, dismissed plaintiff's suit. The lower Appellate Court also dismissed it on the ground that the offering was voluntary, and therefore might be made to any one without giving a right of action to another against the recipient.

In special appeal, the plaintiff's plea below is repeated before us.

We concur in the opinion of the lower Appellate Court, which is supported by the principle of the leading decisions, S. D. A. Rep. page 428, 1849, 8th November; page 296, 1850, 13th June; page 362, 1857, 13th March.

We accordingly dismiss the special appeal with costs.

The 21st January 1865.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice,* and Shumboonath Pundit, *Judge.*

Evidence—Certificate under Act XXVII of 1860 (Effect of)—Mortgage.

Case No. 2863 of 1863.

Special Appeal from a decision passed by Mr. W. Ainslie, Judge of Patna, dated the 29th June 1864, *affirming a decision passed by the Principal Sudder Ameen of that District, dated the 28th January* 1864.

Bundhoo Bhugut (Defendant), *Appellant,*

versus

Syed Mahomed Hossein (Plaintiff), *Respondent.*

Mr. R. E. Twidale for Appellant.

Mr. C. Gregory for Respondent.

In a suit by C as purchaser from A as heir of B, the grant of a certificate under Act XXVII of 1860 to A, as daughter and heir of B, to collect his debts, does not preclude the defendant who was not a party to that proceeding from showing that A was not B's daughter.

Certain property, purchased in the name of B, was mortgaged by him to the defendant, to whom a further charge was subsequently executed by D, E, and F. In a suit for redemption by plaintiff claiming title as heir of B,—Held that the defendant was at liberty to shew that B was only a trustee for D, E, and F.

The plaintiff, as purchaser from Sudroonissa, who is alleged to be the daughter of Mehndee Hossein, sues for possession of certain property which formerly stood in the name of Mehndee Hossein and was mortgaged by him to the defendant to secure rupees 150. The defendant alleged that Mehndee Hossein was only a trustee for Mozuffur Hossein, Luteefun and Wuzeerun; and that Mozuffur Hossein, Luteefun and Wuzeerun subsequently executed a bond to him to secure a further sum of rupees 350, the interest upon which, by a subsequent arrangement, was charged upon the land.

The plaintiff put in a certificate obtained by Sudroonissa, under Act XXVII of 1860, enabling her to collect the debts of Mehndee Hossein.

The Judge refused to try the question whether Sudroonissa was the daughter of Mehndee Hossein; and on the question whether the property belonged to Mehndee Hossein or Mozuffur Hossein and the two ladies, says that, as the plaintiff has failed to produce any deed from which he could infer that Mehndee Hossein was a mere nominal party, if the defendant chose to treat him as principal, not knowing him to be anything else, he cannot turn round and refuse to acknowledge his title; that if he knew him to be a nominal party, he should have secured good evidence of it. He affirms the decision of the first Court, dismissing the suit.

The defendant appeals.

We think, in the *first* place, that although, as between Sudroonissa and any other immediate heir of Mehndee Hossein who could have appeared, the granting of the certificate under Act XXVII of 1860 might have been conclusive evidence that she was the daughter and heir of Mehndee Hossein, it is not so as against the defendant who was not a party to, and not bound by, that proceeding, and that he was at liberty to show that Sudroonissa was not the daughter of Mehndee Hossein. The Judge must try this question.

Secondly, we think that although, no doubt, the fact that the purchase was in the name of Mehndee Hossein is *primâ facie* evidence that he was the party legally interested in

the purchased property, and although it is true that the defendant, who took a mortgage from him, ought not to be allowed to defeat his claim to redeem simply by setting up the title of a stranger, still if the circumstances lead to the inference that Mehndee Hossein had admitted the title of Mozuffur and the ladies, and still more if it appears that he or rather the plaintiff, who now assumes to represent him, is colluding with Mozuffur or any one else to defeat the rights of the defendant as mortgagee, or the title of the ladies, that presumption will not bar the right of the defendant to show what are the true rights and interests of the parties at the present time.

The suit for rent, notwithstanding the existence of the mortgage, the subsequent suit by Mozuffur to redeem his 2 annas 1 pie share on payment of rupees 150 only, and the present suit following each other, lead to doubts in our minds whether the parties are not colluding together and trying to defeat the title of the defendant as mortgagee.

It will be convenient to make Wuzeerun and Luteefun parties, and the Judge must try the question as to whether Mehndee Hossein or the others were the real purchasers.

The Weekly Reporter,

APPELLATE HIGH COURT.

No. 5.] FEBRUARY, 1865. [Vol. II.

The 21st January 1865.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Pottah (Tender of, by Landlord).

Case No. 2425 of 1864.

Special Appeal from a decision passed by the Judge of Jessore, dated the 2nd June 1864, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 12th June 1862.

Huronath Roy and others (Plaintiffs), *Appellants,*

versus

Mr. Gow Smith and others (Defendants), *Respondents.*

Baboos Sreenath Doss and *Obhoy Churn Bose* for Appellants.

Mr. R. T. Allan for Respondents.

Suit for ejectment and mesne profits before Act X of 1859. The defendant (a planter) was allowed to continue in possession of certain lands until a certain time when he was to relinquish all but those fit for indigo cultivation, which he was to keep on paying rent to, and taking a pottah from, the plaintiff. The plaintiff alleged that the defendant did not take a pottah; the defendant answered that one was refused him though applied for. HELD, that the landlord was bound to make a positive tender of a pottah, and not to insist on his tenant taking the initiative.

THIS suit, which was brought before Act X of 1859 came into operation, was instituted by the special appellant (plaintiff in the Court below) to eject the defendant from 135 beegahs of land, and to recover mesne profits.

It appears from the record that, on the plaintiff's taking possession of his property, an under-tenure purchased by him at auction, he was opposed by the special respondent who disputed his right to enter on certain lands. The difficulty was settled by allowing the special respondent to continue in possession of the lands claimed till the year 1260 B. S., when he was to relinquish all but those fit for indigo cultivation; these he was to keep on paying rent to, and taking a pottah from, the proprietor, *i. e.*, the special appellant.

He (special appellant) pleads in this case that the planter did not take this pottah. The special respondent retorts that one was never offered to him, but on the contrary was refused on application.

The Principal Sudder Ameen dismissed the suit.

It is urged in special appeal:—

1*st*. That the *onus* of proving tender of pottah was wrongly imposed on special appellant; and that, as the special respondent holds the land without lease and without payment of rent, he ought to be ejected; and,

2*nd*. That the special respondent has failed to act up to the provisions of the *dufawaree* agreement, and is, therefore, liable to ejectment.

We see no reason whatever to interfere in this case. The special respondent has deposed on oath that he applied for a pottah and was refused; and the circumstances of the case prove to demonstration that there could have been no neglect on his part to carry out the agreement and take a pottah. The land was absolutely essential to the special respondent for indigo growing purposes; and to suppose that special respondent refused to come forward and offer to take what offered to him his sole chance of success, is too

absurd a proposition to be a entertained for a moment.

But we would go farther than this and say that, in such cases as this, the landlord is bound to make a positive tender of a pottah, and not to insist on his tenants' taking the initiative.

The special appellant, we observe, claims to hold the special respondent to the terms of the *dufawaree* agreement. We have read this document. It is to the effect that "the "saheb shall take a pottah for all his indigo "lands which shall remain in the saheb's pos- "session, and that special appellant will re- "ceive rent for the same according to custom "after measurement."

So then, as no measurement has yet been carried out, the special appellant has, strictly speaking, no *locus standi* at all. The pottah was to be a consequence of the measurement, naturally enough, as, without a measurement, there were no means of determining the quantity of land in the special respondent's possession; and as that measurement was not made, no pottah could be given.

In no point of view, therefore, has the special appellant the slightest vestige of a case, and we dismiss the special appeal with costs and interest.

The 21st January 1865.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Sale in execution of decree (Reversal of, for irregularity)—Onus probandi—Non-issue of notice.

Case No. 2533 of 1864.

Special Appeal from a decision passed by the Principal Sudder Ameen of Bhaugulpore, dated the 10th August 1864, affirming a decision passed by the Sudder Ameen of that District, dated the 3rd February 1864.

Musst. Nufusa (Defendant), *Appellant,*

versus

Syud Mahomed Akbar Gazee and others (Plaintiffs), *Respondents.*

Mr. A. F. Lingham and *Baboo Tarucknauth Sein* for Appellant.

Mr. John Baptist for Respondents.

When a judgment-debtor sues to set aside a sale in execution of a decree on the ground of irregularity, the *onus* of proving the irregularity is on him.

The non-issue of notice is not an irregularity that can vitiate a sale.

THE special appellant in this case is the auction-purchaser at an execution of decree sale of a 9 anna share of Mouzah Mostafapoor, and the plaint was to set aside this sale on the ground of irregularity of procedure.

The special respondent (plaintiff in the Court below) was the judgment-debtor.

It appears from the record that the execution of decree case was struck off on the 15th of July 1854. Under this execution the usual notices were duly issued; this is admitted.

On the 22nd of August following execution was revived, and on the 5th of December in the same year the estate was sold, the sale being confirmed by the Judge on the 13th of February 1855.

The purchaser, on getting possession, sued the present special respondent and other parties, to set aside an alleged mokururee title preferred by them against his claim. He got a decree against the so-called mokurureedars on the 28th of December 1858, which was confirmed in appeal just one year later, *viz.*, on the 29th of December 1859.

The special respondent in this case sued to set aside the sale of the 5th of December 1854, on the ground that no ishtahar of attachment was issued, and that the sale was, therefore, irregular; and succeeded in getting a decree from both the lower Courts.

It is urged in special appeal—(1) That the plaintiff, who alleged that there had been an irregularity, was bound to prove it, whereas the Principal Sudder Ameen had thrown the "onus" on the defendant; and (2) That, supposing an irregularity proved, it was not of a nature to cause any loss or damage to the judgment-debtor, and could not, therefore, justify a reversal of the sale.

We think that both points must be given in favor of the special appellant. In the judgment of the Privy Council, dated the 9th of December 1862, Rajah Mohesh Narain Singh *versus* Kishnanund Misser and another (Marshall's reports, page 592), it is clearly laid down that, where it is alleged that the notices required by Regulation XX of 1795, Section 12, had not been affixed previous to the sale, the *onus* of proving the default in affixing the notices lay upon the judgment-debtor and not upon the auction-purchaser.

On the second objection, we observe that the principle of the Privy Council ruling applies to it equally with the other, and

although the non-issue of notice under circumstances like the present may be an irregularity, still it is not one that can vitiate a sale. It is admitted that notice was issued in the first execution; and as observed in the judgment above mentioned, "it would be contrary to general principles and a senseless addition to all the vexations of delay in the course of procedure, to hold that, when for any reason, satisfactory or not, the execution of a final decree in a suit fails or is set aside, and the proceedings as regards that execution are taken off the file, the whole suit is discontinued thereby, and the further proceedings for the same purpose were to be considered as taken in a new suit."

This ruling would, we observe, sufficiently meet this case, but there is also one of the late Sudder Dewanny Adawlut which is precisely on all fours with it. It was held by that Court (10th April 1858, Sudder Dewanny Adawlut No. 151 of 1857, Umrit Lall Sahoo and another, appellants) that where the notification of sale required by Regulation VII of 1825 is admitted to have been completed, the failure to publish a notice of attachment, similar in terms to the notification of sale, is not a material deviation from the provisions of the law.

We, therefore, reverse the decision of the Principal Sudder Ameen, and uphold the sale with all costs on the special respondent.

The 21st January 1865.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Suit for Possession—Admission of dispossession—Onus probandi.

Case No. 2342 of 1864.

Special Appeal from a decision passed by Mr. F. L. Beaufort, Judge of the 24-Pergunnahs, dated the 23rd July 1864, *affirming a decision passed by Baboo Koylash Chunder Deb, 2nd Principal Sudder Ameen of that District, dated the 9th May* 1863.

Nawab Nazir Sidhee Nuzeer Ali Khan Bahadoor (Plaintiff), *Appellant,*

versus

Woomesh Chunder Mitter (Defendant), *Respondent.*

Messrs. G. C. Paul and *A. F. Lingham* for Appellant.

Baboos Dwarkanauth Mitter, Kalee Mohun Doss, Chunder Madhub Ghose, Unnoda Pershad Banerjee, and *Romesh Chunder Mitter* for Respondent.

When a plaintiff sues for possession, admitting that he was dispossessed more than 10 years before suit, the onus is on him to show that he, or some person through whom he claims, was in possession at some-time within 12 years.

THIS was a dispute between the proprietors of two Soonderbun Lots, Nos. 70 and 79, for possession of a strip of land lying contiguous to both. The special appellant (plaintiff in the Court below) is the owner of Lot No. 79.

Special respondent takes a preliminary objection to this appeal being heard, on the ground that the Judge has found, as a fact, that the other side have not been able to prove possession at any time, and are consequently barred by limitation.

It is contended by the special appellant that the land in dispute is a narrow strip of jungle of which there could be no actual possession, and that the law of limitation could not, therefore, be applied. He contended that, in such a case, possession must follow title.

On looking into the record, we find from the special appellant's own statement of the case, that the land in dispute cannot be jungle, inasmuch as it is valued at upwards of rupees 1,600, more than five rupees a beegah, and inasmuch as special appellant has claimed no less than rupees 1,500 as mesne profits.

For the rest we observe that, as the special appellant himself admits that he has been dispossessed since the 26th of July 1851, or more than 10 years before the institution of the present suit, the *onus probandi* was on him to show that he or some person through whom he claimed was in possession at some time within the period of 12 years. And to use the words of the Privy Council in the case of Maharajah Koonwur Baboo Hetnarain Singh (Moore's Indian Appeals, volume VIII, page 200) "no proof of anterior title in his favor, such as would be involved in a boundary question, could relieve him from this *onus*, or shift the *onus* on the defendants by compelling them to prove time and manner of possession."

Now the Judge has found as a fact that the special appellant has "never held possession of the land in dispute; that he has undertaken to prove that he is entitled to certain lands of which he has confessedly never had possession; and that he has failed to show any title, and to prove that the previous proprietors of Lot No. 79 ever had

possession of them." He has found also as a fact that the special respondents have had possession of the lands for the last 10 years at least.

This being the case, and with advertence to the precedent above quoted, the special appellant would clearly be out of Court, the *onus* being on him, and he being in the Judge's opinion altogether unable to dispose of it.

Under such circumstances, it was unnecessary for the Judge to have taken up the case on its merits. He did so, we must suppose, in order to dispose of the case more completely; but the special respondent's title was on the evidence unassailable on the primary question of limitation.

We dismiss the appeal with costs.

The 23rd January 1865.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Case No. 2505 of 1864.

Mahomedan law (Sheeas)—Custody of minor female child—Damages.

Special Appeal from a decision passed by Baboo Grish Chunder Ghose Roy Bahadoor, Principal Sudder Ameen of the 24-Pergunnahs, dated the 10th June 1864, affirming a decision of Baboo Mohendro Nauth Bose, Additional Moonsiff of that District, dated the 28th March 1864.

Musst. Raj Begum (Defendant); *Appellant,*

versus

Nawab Reza Hossein *alias* Acha Shaheb (Plaintiff), *Respondent.*

Baboo Bamachurn Banerjee for Appellant.

Mr. R. E. Twidale for Respondent.

HELD (according to a futwa of the Cazee-ool-Cozaat) that, amongst Sheeas, the custody of a female child rests with the mother only up to the seventh year.

Section 192 Act VIII of 1859 only applies to suits for damages for breach of contract, and does not authorize damages for refusal of a mother to comply with an order of Court to deliver up her daughter.

THE parties to this suit are Mahomedans of the *Sheea* sect. The respondent was the plaintiff in the Court of first instance, and sued to recover possession of his daughter, an infant, in the custody of the defendant. The defendant was the plaintiff's *moteh* wife, *i. e.*, by an inferior kind of marriage, but recently left him, carrying with her their daughter, whom the lower Courts have found to be between 7 and 8 years of age. The plaintiff put forward a case of misconduct on the part of the defendant, disqualifying her for the custody of the daughter; but that case has not been established, although the lower Appellate Court says that "in fact, "if the minor daughter be allowed to re-"main with her mother, there is every pro-"bability of her character being stained." Both the lower Courts decided in the plaintiff's favor, being of opinion that, according to Mahomedan Law, the father is entitled to the custody of a minor daughter above the age of 7 years.

In appeal it is urged that the decision which has been passed is wrong; and that, according to Mahomedan Law, the mother is entitled to the custody till the minor attains puberty*. This may be true so far as Mahomedans of the *Soonee* sect are concerned; but the *Soonee Law is inapplicable* to the present case, the parties in which are *all Sheeas*. It appears to us that the lower Courts have adopted a proper course, and have come to a right conclusion in the matter. The question being one of Sheea Law, a reference was made to the Mahomedan Law Officer of the Presidency, the Cazee-ool-Cozaat, who gave it as his opinion that the Sheea Law books ruled that, amongst Sheeas, the custody of a female child rests with the mother only up to the seventh year, although some Moulvies held it rested with her till the ninth. The Courts, finding this opinion supported by that of other authorities, have adopted it and acted upon it. In our opinion, the law has been laid down correctly, and so for as that point is concerned, we see no reason to interfere with the decree appealed from.

* See Macnaghten's Mahomedan Law. p. 63, also the Hydaya I, 388.

But the decree not only orders the daughter to be delivered up, but goes on to direct that for every month during which the defendant fails to comply with the order, she shall pay to the plaintiff 100 rupees by way of damages, and this direction is said to be made in accordance with Section 192 of Act VIII of 1859. That Section, however, has no reference whatever to a case like this. It is expressly limited to cases "where the suit is for damages for breach of contract." This is *not* an action for damages for breach of contract: and therefore no damages can be awarded in it. So much, therefore, of the decree of the lower Court as orders these damages to be paid must be set aside. The

plaintiff must enforce his decree in the usual manner, and the provisions of the law are amply sufficient if actively enforced.

The decree appealed from must be altered as above indicated; and, under the circumstances, the parties must respectively bear their own costs of this appeal.

The 23rd January 1865.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Judgment (of Appellate Court)—Reversal of decision of lower Court.

Case No. 2299 of 1864.

Special Appeal from a decision passed by Mr. L. W. Hutchinson, Additional Principal Sudder Ameen of East Burdwan, dated the 3rd May 1864, reversing a decision of Baboo Kedarnath Bannerjee, Additional Moonsiff of that District, dated the 11th July 1863.

Kartick Nepit (Defendant), *Appellant,*

versus

Personomyee Neptinee (Plaintiff), *Respondent.*

Baboo Bhobany Churn Dutt for Appellant.

Baboo Chunder Madhub Ghose for Respondent.

It is the duty of an Appellate Court, in reversing the decision of an inferior Court, to explain its reasons for so doing.

PLAINTIFF sued her husband for maintenance on the allegation that her husband ill-treated her and drove her from her home.

Defendant's case was that plaintiff, having been unchaste, was not entitled to claim maintenance, and that a claim of this character by plaintiff had already been dismissed by the Criminal Court, and could not be revived in the Civil Court.

The first Court held that the present suit would lie, but dismissed plaintiff's claim, giving its reasons in detail for thinking her immoral conduct was proved, and that she had therefore no legal right to any maintenance from her husband.

The lower Appellate Court stated that the question whether this suit would lie in the Civil Court was not urged before it. On the merits the lower Appellate Court records—"It must be borne in mind that plaintiff is "accused of a very serious crime against "society and religion. If the Civil Court "were to pronounce her guilty, she would "be totally lost and without pity, in her "despair she might be driven to do that "which she ought not to do. I have carefully considered the evidence produced "against her, but fail to perceive that she "is guilty of adultery."

The plaintiff's suit was accordingly decreed by the lower Appellate Court. Defendant appeals specially urging that the above judgment does not give any reasons, as required by Section 185 Act VIII of 1859, for over-ruling the contrary finding of the first Court; and that he is entitled to the opinion of the lower Appellate Court as to *why* the evidence which satisfied the first Court, and referred to by it in detail did not satisfy the lower Appellate Court.

We think this objection valid, and we accordingly remand the case for the lower Appellate Court to give its reasons for not crediting the evidence and facts noticed by the first Court.

It is the duty of an Appellate Court, in reversing the decision of the inferior Court, to explain its reasons for so doing; and Act VIII of 1859 especially directs that this shall be done.

Remand accordingly.

The 24th January 1865.

Present:

The Hon'ble C. B. Trevor and A. G. Macpherson, *Judges.*

Sale of Talook for arrears of rent—Rights of purchasers.

Case No. 1968 of 1864.

Special Appeal from a decision passed by Mr. F. J. Cockburn, Additional Judge of Backergunge, dated the 30th April 1864, reversing a decision passed by Baboo Nobin Kishen Paulit, Principal Sudder Ameen of that District, dated the 16th May 1863.

Jeebun Singh Burmono (Plaintiff), *Appellant,*

versus

The Collector of Backergunge (Defendant), *Respondent.*

Baboos Kalee Mohun Dass and *Hem Chunder Banerjee* for Appellant.

Baboo Kishen Kishore Ghose for Respondent.

The Government having once recognized the plaintiffs talook by selling it for arrears of rent to the parties through whom the plaintiff claims, and no

disclaimer of his talookdaree right having ever been made by the plaintiff,—HELD that it was not competent to the Government to deny the title of a tenure which it had, by selling once, guaranteed to the purchasers.

IT appears that Government is the purchaser at a sale for arrears of revenue of a large and well known estate called Pergunnah Bozoorgomedpore, situated in Zillah Backergunge. The Government lately put up a talook, Bunder Backergunge, for sale, styling it a khas mehal, and ignoring all under-tenures in it. The plaintiff now sues for a confirmation of his right as a Shikmee talookdar under the zemindar, Government, the purchaser. He pleads that his talook was mentioned in the old papers of the estate at the time of Mr. Thompson's butwarrah and measurement of the Pergunnah; that Government itself sold the under-tenure in 1844 for arrears of rent under Clause 7, Section 15, Regulation VII of 1799, when it was purchased by parties from whom he has derived his title; that, in the face of the sale and acknowledgment of the tenure by Government, it cannot now ignore the same. He, therefore, prays to have its existence confirmed.

Government cannot and does not deny the existence of these facts, but pleads that plaintiff has taken from it farming leases and executed kubooleuts inconsistent with the existence of the talook and that, therefore, it is now incompetent to them to claim under a title which, on the supposition that it once existed, they have advisedly relinquished.

We think the case is a very simple one. As long as Government was the zemindar of Bozoorgomedpore, the under-tenants entered into arrangement with Government, not being particular as to the designation given to them. Now, Government is about to sell or has sold its zemindaree rights; and the under-tenants assert their old rights against the zemindar, who is likely to enter by right of purchase. In this case, Government have recognised the talook of plaintiff, and have sold it for arrears of rent to the parties from whom the plaintiff claims; and no clear disclaimer of his talookdaree title has ever been made by plaintiff. Under these circumtances, we think, it is not competent to Government to deny a title of a tenure which they have, by selling once, guaranteed to the purchasers. We therefore, reverse the order of the lower Appellate Court, and declare that the sale of Government rights as zemindar in the talook Bunder Backergunge is made subject to the existence of plaintiff's under-tenure. This judgment will not affect any right which the zemindar may have under the law in force to take steps for raising the rents to be paid by plaintiff. The special appeal is decreed with costs.

The 24th January 1865.

Present:

The Hon'ble C. B. Trevor and A. G. Macpherson, *Judges.*

Mahomedan law—Pre-emption—Fictitious Sale.

Case No. 2087 of 1864.

Special Appeal from a decision passed by Mr. W. Ainslie, Judge of Patna, dated the 6th May 1864, *reversing a decision passed by Moulvie Syud Sukhamut Hossein, Principal Sudder Ameen of that District, dated the 5th January* 1864.

Musst. Mohno Bibee (one of the Defendants), *Appellant,*

versus

Juggurnath Chowdhry (Plaintiff), *Respondent.*

Mr. C. Gregory and *Baboo Roopnath Banerjee* for Appellant.

Baboo Unnoda Pershad Banerjee and *Moulvie Syud Murhamut Hossein* for Respondent.

There is no right of pre-emption where there has not been a real *bonâ fide* sale according to the Mahomedan law.

THE only question in this case is whether, according to Mahomedan Law, a right of pre-emption can arise on a fictitious sale. The appellant conveyed certain property by bill of sale to the defendant, Goopeenath. Thereupon the plaintiff claimed the right of pre-emption in the property, and instituted this suit to establish that right and to get possession. The appellant and Goopeenath, who were the two defendants, pleaded in effect that the sale was not a real sale, but was merely intended to operate to transfer the appellant's rights to Goopeenath after the death of the appellant; their case in fact was that the bill of sale was intended only to operate as a will. The lower Appellate Court decided in favor of the plaintiff, holding that, whether the sale were fictitious or not, still as it was a bill of sale which had been registered before the Kazee, and which would, after appellant's death, operate to transfer the property to Gopeenath, the right of pre-emption would arise. In special appeal, it is contended that this ruling is

wrong in point of law so long as the lower Court did not find as a fact that there was a *bonâ fide* sale.

We think the objection taken to the ruling of the lower Appellate Court is well founded. It was in our opinion most material for the Court to decide whether the sale was fictitious or not. If it were a real *bonâ fide* sale according to Mahomedan Law, then the right of pre-emption would arise. But this right would not arise if no real sale had taken place, or if the transaction wereme rely fictitious. If the sale were only in fact a will or a gift, and could not possibly have any other effect, no right of pre-emption could arise. That it cannot arise on anything save a real sale, appears from the definitions and rules given by Macnaghten in his "Principles of Mahomedan Law." Moreover, it has been decided by the late Sudder Court in a case reported at page 306 of the 6th volume of the Select Reports, that there is no right of pre-emption where the sale is fictitious or for a temporary purpose only. *See* also the decision of this Court on the 25th May 1864 in special appeal No. 2030 of 1863.

The judgment of the lower Court is, we think, clearly wrong as it stands: and the case cannot be properly decided until there is a distinct finding by that Court as to whether the sale was a real sale properly so called, or was only a fictitious one. The case is remanded for re-trial and decision with reference to the above remarks.

The 24th January 1865.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges*.

Estoppel (finding in another suit).

Case No. 2237 of 1864.

Special Appeal from a decision of Moulvie Syed Waheeduddeen Khan Bahadoor, Principal Sudder Ameen of Bhaugulpore, dated the 21st May 1864, modifying a decree of the Moonsiff of Kishengunge, dated the 10th February 1864.

Dahoo Munder (one of the Defendants), *Appellant*,

versus

Gopee Nund Jha (Plaintiff), *Respondent*.

Mr. A. F. Lingham and *Baboo Chunder Madhub Ghose* for Appellant.

Mr. J. Baptist for Respondent.

A finding in one suit to which A was a party is no bar against A in another suit, unless it is shown that the issue in question in the latter was raised in the former suit, and was a material issue in it.

AMRIT LALL and Gopee Lall were the proprietors of a share of certain lands. In 1847 they sold and conveyed their share to Peary Lall, who, subsequently, mortgaged it (by bye-bil-waffa) to Greedharee Lall. In 1855, Greedharee Loll sold a moiety of his interest under his mortgage, to Nakoo Dey and Sookoo Dey, the two heirs of the original proprietors, Amrit Lall and Gopee Lall. Nakoo Dey and Sookoo Dey again sold to their two sons Mukhun Lall and Munnoo Lall, who, in 1858, sold to the plaintiff. Meanwhile, in April 1856, Government sold the right, title, and interest of Amrit Lall in the property in question, for arrears of *tuccavee* advances realizable as arrears of revenue, and the defendant, who is the appellant before us, was the purchaser at that sale. In 1856, Greedharee Lall commenced proceedings for the foreclosure of his mortgage, and on the 17th June 1859 got a decree for possession of one moiety of the property. The plaintiff, the purchaser from Mukhun Loll and Munnoo Lall, now sues to obtain possession of the other moiety, but is resisted by the appellant who claims it under his purchase at the above-mentioned Government sale. The lower Appellate Court has decided in favor of the plaintiff; and against this decision the defendant appeals specially, contending that the case has not been properly tried in the Court below, and that the Court based its judgment exclusively on the decision in Greedharee Lall's suit in June 1859, which decision (it is urged) has been wrongly interpreted by the lower Court, and however interpreted, is in no way binding or conclusive as against the appellant in respect of the matters which are the subject of this suit.

We are of opinion that this case must be remanded for the reasons which have been advanced by the special appellant. The decision of the lower Court is exceedingly confused and obscure in its language, and by no means states the facts of the case, the issues tried, and the finding of the Court thereon, with the distinctness and precision with which they are required by law to be stated. It is evident that the Court considered that the decision of June 1859 contained a declaration that no right in the property in dispute remained to Amrit Lall at the time of the Government sale, and consequently that the

purchaser at that sale purchased nothing. Further, the lower Court has held that, as the appellant was a party to that decision of 1859, it is necessarily conclusive as against him in this suit.

The decree of the 17th June 1859, however, on being referred to, appears to us to contain no such finding of fact as the lower Court has supposed it to contain. If it did contain such a finding, the lower Court, while declaring this finding conclusive in this suit, ought to have given its reason for considering it to be so; for the mere existence of a finding in another suit to which he was a party, is no bar as against the appellant, unless it be shewn that the issue in question in this suit was distinctly raised and tried in the other suit, and was a material issue in it. In the case now before us, there is but one material issue, *viz.*, to what is the appellant entitled as purchaser of Amrit Lall's rights at the sale in 1856; or in other words, what were the rights of Amrit Lall in the disputed property at the date of that sale? And, if appellant purchased any rights at all at that sale, was the purchaser subject to or free from prior encumbrances? In order to decide this issue properly, the whole of the previous transactions between the parties must be carefully considered. For, bearing in mind the way in which this property has been passed from hand to hand amongst the various members of the family, it will be the duty of the Court to examine each transaction most strictly, and to declare how far it was merely alienable, and how far it operated really to transfer the proprietary right. The precise nature and extent of the rights of Amrit Lall (if he had any at the date of the sale, must be ascertained and defined, and the Court will then be in a position to declare what it was that the appellant purchased, and how far he is in a position to resist the plaintiff's suit. The Government sale took place under Act I of 1845 (as is admitted). Section 26 of that Act clearly defines under what species of sale the property passes free of encumbrances, or otherwise. The lower Court will, after distinctly finding the fact, apply to them the provisions of that law.

Remand accordingly.

The 24th January 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Shoosung Estate (Succession to)—Evidence (taken by lower Court under Section 355 Act VIII of 1859)—Objections to, before Appellate Court—Copies of documents.

Case No. 407 of 1862.

Regular Appeal from an order passed by Moulvie Mahomed Nazim Khan, Principal Sudder Ameen of Mymensingh, dated the 10th July 1862.

Ram Joy Surmah and another (Defendants), *Appellants,*

versus

Rajah Prankishen Singh (Plaintiff), *Respondent.*

Mr. R. T. Allan and *Baboos Kishen Kishore Ghose* and *Sreenath Doss* for Appellants.

Mr. R. V. Doyne, and *Baboos Onookool Chunder Mookerjee, Unnoda Pershad Banerjee, and Dwarkanath Mitter*, and *Moonshee Ameer Ali Khan Bahadoor* for Respondent.

Case No. 495 of 1862.

Buroda Debia and others (Defendants), *Appellants,*

versus

Rajah Prankishen Singh (Plaintiff), *Respondent.*

Mr. G. C. Paul and *Baboos Mohindro Lall Shome* and *Prosunno Coomar Sein* for Appellants.

Mr. R. V. Doyne, and *Baboos Onookool Chunder Mookerjee, Unnoda Pershad Banerjee, and Dwarkanath Mitter*, and *Moonshee Ameer Ali Khan Bahadoor* for Respondent.

Case No. 515 of 1862.

Pronnoda Debia and others (Defendants), *Appellants,*

versus

Raja Prankishen Singh (Plaintiff), *Respondent.*

Baboo Kishen Succa Mookerjee for Appellants.

Mr. R. V. Doyne, and *Baboos Onookool Chunder Mookerjee, Unnoda Pershad Banerjee*, and *Dwarkanath Mitter*, and *Moonshee Ameer Ali Khan Bahadoor* for Respondent.

Suit laid at Rs. 18,389-5 annas 6 pie.

The plaintiff claimed to succeed to the Shoosung estate as sole proprietor, alleging a family custom according to which the property was a Raj and indi-

visible, and descended to the oldest son or nearest male heir of the party in possession. HELD that there was no satisfactory proof of such family custom; that, if there had been, it was waived by the sons of Raj Singh (the plaintiff's grandfather) on his death in 1822; that the documents submitted to the Court did not prohibit alienation; that, at a period previous to the British rule alienation of 2-16ths of the property did take place and was acquiesced in by the successors; that the property was, during the Mahomedan Government, a military jagheer resumable at pleasure, and not a Raj; and that the succession to it went, not by right or family custom, but by the will of the sovereign power.

HELD also that a lower Court, in taking evidence ordered under Section 355 Act VIII of 1859, acts in a ministerial capacity; that a defendant may raise any objections he pleases to the documentary evidence adduced by the plaintiff when it is submitted for the consideration of the Appellate Court; though no objections were taken to it in the lower Court; and that a plaintiff filing copies of documents is bound to explain why the originals have not been filed.

THIS suit is brought to recover possession of a 5-anna 6 gundas share of Pergunnah Shoosung, on the ground that, by family custom, the property being a Raj is indivisible, and descends to the eldest son of the party in possession, to the exclusion of younger sons and female relatives, and on failure of sons it goes to the brother of the deceased proprietor, or to the nearest male heir.

It is advisable to give a sketch of the history of this estate and of the litigation which has gone on from 1822 to the present period. Pergunnah, Shoosung is alleged to have been granted by one of the Mahomedan Rulers as a Raj to an ancestor of the plaintiff, and to have descended, according to family custom, to the eldest son of the reigning Rajah, who, on his accession, inherited the Raj, and assumed the title of Rajah, while the younger brothers had the title of Koonwur and Mohashoy, and received a maintenance; that the Raj had thus been successively held for thirteen generations, till it came into the possession of Rajah Raj Singh, who succeeded his brother Kishore Singh in the year 1784 (1191) Rajah Raj Singh died on the 12th Falgoon 1228 (February 1822), leaving three sons—Bishunauth Singh, Gopeenauth Singh and Juggurnauth Singh. On the death of Raj Singh, the three brothers, claiming equal shares in the property, applied to the Collector to have their names registered as joint proprietors of 14 annas of Pergunnah Shoosung, and the registration was made on 23rd April 1822 (12th Bysack 1229). The brothers held joint possession, brought suits sometimes jointly and sometimes in their own names. Juggurnauth Singh died on 29th Bysack 1236 (9th May 1829); and his widow, Indro Monee, applied to the Collector to have her name registered as proprietor of one-third of the estate in lieu of her deceased husband. After the necessary notifications had been issued, and no objection had been raised either by her brothers-in-law or any other person, her name was duly registered in Bhadoon 1236 (July 1829). Gopeenauth died in Jeyt 1240 (June 1833); and the name of his widow, Huro Soonduree, was, after the necessary preliminaries, duly registered on 29th Assar 1240 (15th July 1833). The widows continued to hold joint possession with their brother-in-law, Bishunauth Sing, the sole surviving son of Raj Singh.

In 1843, there is the first appearance of a dispute in the family. In that year Huro Soonduree applied to the Collector for a partition of the estate under the provisions of Regulation XIX of 1814. Notices were duly served, and on this occasion Bishunauth, for the first time, put forward his claim to be considered the sole proprietor, alleging a family custom which required the estate to descend to the eldest living son, to the exclusion of all younger sons and of the widow and of other relatives, male and female.

The Collector referred the parties to the Civil Court, and on 18th September 1843, Huro Soonduree brought an action praying for a partition of the property. Rajah Bishunauth Singh pleaded family custom under which the property descended undivided to the eldest son, denying the right of Huro Soonduree to any thing but her maintenance. Huro Soonduree's suit was dismissed by the first Court on 16th December 1844, and this decision was confirmed on appeal by the late Sudder Court on 17th July 1847, (page 339, Sudder Dewanny Reports), and by that decision the plea of family custom was held to be fully established. An appeal was preferred by Huro Soonduree to the Privy Council which was struck off for default on 6th April 1858, and the litigation between these two members of the family ceased for a time.

After the death of Indro Monee, the widow of Juggurnauth Singh, on 29th Poos 1250 (1st January 1844), a dispute arose between Bishunauth Singh and Ram Churn Mojoomdar, the guardian of an alleged son of Indro Monee. Under an Act IV award, the adopted son was kept in possession, and the Rajah Bishunauth Singh brought a suit for possession of the one-third share of the estate which had been held by his brother

Juggurnauth, and after him by his widow, on the ground of the family usage confining the succession to the eldest son of the reigning Rajah. He got a decree in the first Court on 7th February 1853. An appeal was preferred to the late Sudder Court by Ramchunder Mojoomdar, and the Court reversed the decision of the Principal Sudder Ameen, holding that the plea of family custom was not established, the documents and other evidence adduced being insufficient to prove the existence of that custom. This decision, which goes very fully into the case and examines minutely each document filed by the plaintiff in support of his allegation, was passed on 12th May 1856 (page 399, Sudder Dewanny Reports). An appeal to the Privy Council was put into this Court; but Bishunauth Singh, then represented by his son, Pran Kishen Singh, took no further steps to expedite the appeal, and it was struck off by orders of the Sudder Court on 21st December 1857.

Having failed to establish his right to succeed to the property under the plea of family custom, Pran Kishen Singh, as son and representative of Bishunauth Singh, brought a fresh suit to obtain possession, and to set aside the adoption under the common law of inheritance; and he succeeded both in the first Court and in the Sudder Court, which, on 8th November 1861, set aside the adoption as not proved, and gave a decree to the plaintiff as next heir to his deceased uncle, Juggurnauth.

In the meantime, disputes had again arisen between Bishunauth and Huro Soonduree, the widow of Gopeenauth. Bishunauth, under the allegation that he held a decree of the Sudder Court declaring the estate to be his sole property by family custom and impartible, tried to eject her, but her possession was confirmed by the Magistrate on 3rd March 1859. After the death of Bishunauth, his son Pran Kishen, the plaintiff in this suit, brought the present action to set aside the Act IV award; again, basing his claim to possession on the family custom, a question, which, as far as he and his father were concerned, had been fully determined against them in the decision of this Court of May 1856. In support of his claim, the plaintiff filed copies of the decision of the late Sudder Court of 17th July 1847, and of the order of the Privy Council of 6th April 1858, by which the appeal of Huro Soonduree had been struck off for default.

On the 10th July 1862, the Principal Sudder Ameen gave a decree for the plaintiff, holding that the decision of the Sudder Court, bearing date the 12th May 1856, had been set aside by the order of the Privy Council of 1858, and that the existence of the family custom is proved by the decision of the late Sudder Court of July 1847, which had been confirmed by the subsequent order of the Privy Council in 1858. From this decision an appeal was filed by the representatives of Huro Soonduree, and on the 19th August 1863 the appeal came up for hearing, and was remanded by the High Court to enable the plaintiff, respondent, to file any legal evidence he might have, as the copies of the decisions, upon which he relied, and on which the Principal Sudder Ameen had decided, were not legal evidence, the parties to this suit not being the same as those in the other suits. The Court, in their proceeding of the 19th August 1863, called for evidence on the following points:—

1*st*.—Whether, according to the usage of the family, the plaintiff as the eldest son is entitled to succeed on the death of his father.

2*nd*.—Whether, if any usage prevailed in the family, it was waived or abandoned on the death of the father.

3*rd*.—Whether there is any thing contained in any grant or other document relating to the estate either before or after the accession of the British Government, such as a restriction against alienation or division of the estate, which would prevent the plaintiff from being bound by the acts or laches of the father.

The Principal Sudder Ameen, after taking the further evidence required by the Court under Section 355 Act VIII of 1859, submitted the record which has now come before us. The further evidence consists of the depositions of sundry witnesses—copies of the evidence of five witnesses taken in the case decided in 1856, said to be deceased; copies of the firman of Ahmed Shah, dated 29th Shabans Juloos (1794 A. D., corresponding with 1160 Hijree) and of the deed of gift, bearing date 22nd Maugh 1141 B. S. (1734 A. D.), the originals of which were filed in the suits decided in 1847 and 1856, an alleged original firman, bearing date the 22nd year of the reign of the Emperor Mahomed Shah, and a perwannah from the khalsa serishta of the British Government, dated 25th March 1784 (7th Chyet 1191) confirming Raj Singh in the estate as successor to his brother, Kishore Singh, both filed in the former suits, and in addition, a deed of gift of some land from

Kishore Singh to his younger brother Raj Singh as Bhurrut Brikyo. This document bears date 25th Maugh 1169 (1763 A. D.) but it has never been produced before. Other documents, *viz.*, a firman of Shâh Jehan, bearing date 1060 Hijree (1650 A. D.), and a perwannah of the *Khalsa sérishta*, dated 30th May 1785, upon the former of which the Judges, who tried the case in 1856, expressed strong doubts as to its genuineness, have not been brought forward in the present case.

With regard to the documentary evidence, we may at once state that we cannot look at the copies of the firman of Ahmed Shah, nor of the deed of gift of 1141 (1734), for the originals were filed in the former suits, and no sufficient reason is assigned why copies have now been substituted. It is said that the defendant made no objection down below to the reception of these copies, and, therefore, the plaintiffs were not given an opportunity to show why the originals were not filed; that they are said to have been stolen as proved by the Police investigation. It is a sufficient answer to this allegation to say that, as the Principal Sudder Ameen in taking the evidence was acting simply in a ministerial capacity, the defendants, appellants, are quite entitled to raise any objections to the documentary evidence they think proper when it is submitted for the consideration of this Court, and the allegation of the originals having been stolen is one of those stale and well-hacknied excuses, which, even when supported by a Police investigation, carries with it as little conviction as a plea of *álibi* by a prisoner in a Criminal trial. It is very remarkable also how the originals disappeared as soon as copies were secured. Knowing, moreover, as the plaintiff must have done, that copies of documents are inadmissible except under special circumstances, he was bound, when filing such copies, to state the circumstances which prevented his filing the originals.

Of the deed of gift bearing date 25th Maugh 1169, filed now for the first time, we think its appearance is sufficient to warrant our at once pronouncing on its untrustworthiness; and even if it were genuine, it would not further the plaintiff's case, nor in any way tend to prove the existence of the family usage. Had it been a genuine document, why, considering the long period during which litigation has been carried on, did it not see the light before the case was remanded for further evidence in 1863?

With regard to the copies of the oral evidence taken in the case decided in 1856, we think, though the witnesses have deceased, an allegation not contradicted by the other side, and though they give evidence on matters of pedigree as well as of family usage, the two subjects being intermingled, their evidence cannot be received, as it was not given in a case between the same parties and it was recorded after disputes had arisen between the parties engaged in the present litigation, or their representatives.

We turn now to the case as put before us, and we can, from the admission of the plaintiff, respondent, made to the Court by his Counsel, Mr. Doyne, at once dispose of the second point on which the case was remanded. It is fully admitted that, since 1822, the property has been held in equal shares, first by Bishunauth, Gopeenauth, and Juggurnauth; and after the death of the two latter, by Bishunauth and the widows of Gopeenauth and Juggurnauth, *viz.*, Huro Soondureé and Indro Moonee. It is pleaded, however, that this possession was not proprietary, but merely permissive; Bishunauth Singh having, for some reason or other best known to himself, made over one-third of the property to each of his brothers as maintenance, retaining one-third only for himself. Now, from the litigation which has been going on for some years, conducted by Bishunauth Singh, it is evident that he was a person quite capable of looking after his own affairs; and it appears to us most improbable that he knowing, as he must have done if there were any existing family custom, that the whole estate belonged to, and must necessarily come to him complete, should have given up two-thirds to his brothers without taking any precaution to accompany his gift with some declaration, by which he might preserve his rights, and keep up the family custom, and make known to the world that his brothers held the property assigned to them merely as maintenance. Further, even supposing that Bishunauth had exercised such self-denial as to give over two-thirds of the property to his brothers for their maintenance, there was no necessity to continue so large a maintenance to their widows; and, knowing the position of widows in a Hindoo family, it is idle to suppose that he would have allowed them to enjoy so large a portion of the revenues of the estate, had they not been entitled to receive them as being in possession of property which did really belong to their husbands. Again, had the property been held by the brothers of Bishunauth,

and, subsequently by their widows as maintenance, the Government revenue would not have been separately paid in by the three parties in possession, but by, and in the name of, Bishunauth Singh, the sole proprietor. Nor, under such circumstances, would there have been any necessity for registering the names of the brothers, and after them of their widows, as proprietors in the Collector's Register? nor is there any probability that the parties would have pursued such a course, destructive alike to Bishunauth's interest as well as to the alleged family custom, and highly injurious to his heirs. Moreover, we find from certain decisions of the Civil Court and the pleadings put in by the parties, that Bishunauth not only recognised his brothers, but also their widows as entitled each to one-third of the rent realised from the ryots, without any mention of their receiving such sums as maintenance. In short, his whole conduct to his brothers and their widows is quite incompatible with the plea now set up, that they held their shares only as maintenance; and it can be accounted for only on the ground that he knew that they were in possession as proprietors in their own rights—a right which he never attempted to dispute during the life-time of Goopeenauth and Juggurnauth. Accepting then this view of the case, it leads us one step further as to the existence or otherwise of the family custom. If such custom existed, why did Bishunauth Singh break through it? He had the example of many generations before him, and his subsequent conduct does not show that he was less selfish than mankind in general. Why then should he be so unusually liberal to his brothers as to divest himself of the larger portion of his property in their favor? No reason is assigned. Affection for his brothers is not suggested, for that principle is not of greater force in this country than elsewhere; and the only sufficient reason assignable for his conduct in joining with his brothers in a common petition to the Collector, as heirs of their father in joint possession of his property, and praying for the registration of their names as joint proprietors, is that he knew there was no such thing as the family custom now set up by his son Pran Kishen, and that his brothers were entitled to an equal share in the estate with himself.

We come next to the plea that the property is a Râj and indivisible, and that it has descended invariably from the father to the eldest son to the exclusion of younger sons, or, on the failure of sons, to the eldest brother to the exclusion of widows, and other relatives. Connected with this issue, we have other subordinate points to be determined—such as limitation, which has been pleaded by the defendant. We cannot dispose of this question till we determine the larger one whether the property be a Râj or not. If it be, then limitation cannot be successfully pleaded, for, if the property be in itself indivisible, no act of the party in possession splitting it into parts, can render such subdivision legal, or prevent the heir at law, when his right of action accrues to him, from bringing a suit to set aside the acts of his predecessors, and reunite the parts into an integral whole. We think, then, that it will be more convenient to allow this question to remain undetermined till the *status* of the property is determined.

Another question which arises is this. If the property be a Râj and is indivisible, and it had, according to family custom up to the death of Raj Singh in 1822, descended from father to eldest son to the exclusion of other sons, would the act of Bishunauth Singh by which he divided the property into three parts, effectually destroy that custom and render its restoration impossible on a suit instituted for that purpose by him or his legal heir?

In support of the allegation that the property is a Râj and indivisible, we have the evidence of several witnesses and certain documents. The oral evidence is of the ordinary kind which may be obtained in any case; and taken as this has been after the remand, it cannot be looked upon as trustworthy. This evidence has been compared with that given by talookdars of wealth and position in the Durbangah and Hutwa cases; and it is contended that it is equally worthy of credit. We cannot subscribe to this opinion, for we find that many of the witnesses, though calling themselves talookdars, are in fact servants of the family and occupy a social position altogether different from that of the independent witnesses who gave their evidence in those two cases; and further we find that their evidence contradicts facts admitted by the plaintiff, respondent. It is admitted that the defendant, appellant, is in possession since the death of Gopeenauth Singh, and that Gopeenauth held possession from 1822 when his name was registered as a joint proprietor with that of Bishunauth, while the witnesses declare that Bishunauth alone succeeded to the property as a Râj, and held sole possession, allowing his brothers a maintenance. The manner, however, in

which the names of the three brothers were registered in the Collector's books, is sufficient to contradict this statement, for that registration clearly shows that the three were considered as proprietors of equal shares in joint possession of the estate, and the subsequent suit for rent and the separate payment of the Government revenue by each of the brothers plainly indicate that Bishunauth had possession of nothing beyond his own share. and was nothing more than a joint proprietor.

In further proof of the existence of this custom, we are told that there were seven *sole* successions, the eldest son invariably excluding the younger, and the brother succeeding when there were no sons to the exclusion of the widow of the deceased, whose right to succeed, had this been an ordinary zemindaree, could not have been disputed. This course of succession during the period of the Mahomedan Government, and after the accession of the British power, may be accounted for in more ways than one; and, admitting it to exist, it neither proves the property to be a Râj, nor establishes the family custom. It may be admitted, as held by the Judges who disposed of the case on the 12th May 1856, that there is something peculiar in this property. It is not improbable that it was, as alleged by the plaintiff, a jagheer for military services, and, as such, held by one of the members of the family, usually the eldest son or brother; and that women were excluded from the succession as being incapable of performing the duties required from the jagheerdar. This succession, however, was not regulated by any family custom, but by the will of the sovereign power; and on referring to the judgment of 1856, we find mention made of three firmans from the Mahomedan Government, only one of which is forthcoming in the present case, which prove that the property was held as a military fief, and that the holder succeeded, not by right of primogeniture, but by the will of the sovereign. Had the estate been a Râj in which a family custom was fully established, succession would have followed in the usual course, and been acknowledged by the Government of the time on the receipt of intimation of such succession. And as regards the succession subsequent to the assumption of the British Government, we find from the *char* of the *khalsa serishta* addressed to Raj Singh on 25th March 1784, after the death of his elder brother, Kishore Singh, and confirming him in possession, that he succeeded, as the words of the document say, according to custom. It is insisted that these words have an especial meaning, and prove that the succession to the estate was as contended for by the plaintiff, for Raj Singh succeeded his brother to the exclusion of the widow, which could not have happened, had the estate been an ordinary zemindaree. Now that the words "*ba dustoor*" according to custom, have the interpretation sought to be put upon them appears to us very doutbful. They may refer to a state of things of which mention is made in the Preamble of Regulation XI 1793, in the following words, and which continued in force till repealed by that law:—"A custom "originating in consideration of financial "convenience was established in these Pro- "vinces under the Native administrations, "according to which some of the most exten- "sive zemindaries are not liable to division. "Upon the death of the proprietor of one of "these estates, it devolves entire to the eldest "son or next heir of the deceased, to the "exclusion of all other sons or relations." The words may also refer to a custom prevalent of acknowledging one of the members of the family as the manager of the estate and representative of the family, and registering the estate in his sole name. But, whatever be the real meaning of the words, it would be unreasonable to consider them standing alone, and in the absence of other trustworthy evidence, to be of sufficient weight to prove the existence of the family custom now sought to be established. Now, what other evidence is there? The oral evidence we think insufficient. The copies of the firman, bearing date 29th Shabans Joloos of Ahmed Shah, and of the Sibbanamah from Ram Singh to Run Singh, cannot be looked at, no reason having been assigned for the absence of the originals, which are said to have been filed on a former occasion. The grant of Kishore Singh to Raj Singh, dated 25th Magh 1169, is clearly an untrustworthy document, and has only seen the light for the first time since this case was remanded; and even if genuine, it proves nothing. So we are thrown back upon one single document bearing date the 22nd year of the reign of Mahomed Shah, which is denounced by the opposite party to be a forgery. This document purports to be a firman from the Emperor Mahomed Shah to Ram Singh confirming the Jagheer of Shoosung to him and requiring him to keep up a certain

body of troops consisting of cavalry and infantry. Admitting for the moment that this document is genuine, it really proves nothing in support of plaintiff's allegation. It does not prove the property to be a Râj, for no such name is used. It is termed a Jagheer, a tenure to be held as compensation for military service, and which might be transferred, at the will of the ruling power, to any other person on the same or different terms. The grantee also is not styled or in any wise recognised as a Rajah, but simply as a zemindar, so that this document establishes nothing which the plaintiff seeks to prove. But, looking at the document itself, we have little doubt that it never came out of the royal office either of Delhi or elsewhere. It is written on common paper and stamped with an oval seal which could be prepared in any bazar in India, and nothing is shewn by which we might test the genuineness of the seal.

There is another document of which it is necessary to take notice. This is a letter from the Collector of Mymensingh, dated 24th Magh, 1820, in answer to an order issued by the Board of Revenue, directing the appointment of Canoongoes to take charge of the estates of the zemindars, as appeared to have been sometimes the practice under the Mahomedan rule. In this letter, the Collector reports that the Rajah, when required to state whether a Canoongoe had ever been appointed to his estate, replied in the negative, and stated that his property was a Royal Jagheer, and that if a Canoongoe were now appointed, the family would be disgraced. On receipt of this report, the Board of Revenue, in their reply of the 9th June following, informed the Collector that it was not expedient to appoint a Canoongoe to Shoosung. This letter, however, proves nothing that the plaintiff seeks to prove. The then Rajah, who must have been Raj Singh, calls the property a Royal Jagheer, and the Board of Revenue respect the feeling of an old family and abstain from offending their prejudices by appointing an officer to look after the collections of their estate. This, however, does not show that the estate was a Râj indivisible from its very nature. On the contrary, the then proprietor called it a Jagheer, and prides himself on its being different from ordinary zemindaries, because it paid a "*peshkush*" and not a "*hustobood* jumma," *i. e.*, that it paid tribute, and not revenue, a distinction which by some means it had retained at the time of the Decennial Settlement.

From the documents which the Court have been able to admit as evidence, we think that, whether the firman and purwannah from the *khalsa serishta* be genuine or not, we are, at any rate, in a position to ascertain in what light the former holders of this property looked upon it. It is evident that the property has all along been considered as a Jagheer for military services, in which the eldest son succeeded the father, or the brother succeeded his deceased brother in the absence of lineal heirs by sufferance of the dominant power, and that the enjoyment and possession of the property was through no right of inheritance but by grant from Mahomedan Rulers for the time being. Taking then the case on their own showing, it appears to us that the estate is not a Râj (though the proprietors call themselves Rajahs, they are not styled by that term in the firmans or purwannahs, but are recognised as zemindars or Jagheerdars); that the omission of younger brothers and females in the participation of the estate is accounted for by its being a military Jagheer which might be assigned to any member of the family at the option of the supreme power; and that, though the eldest male heir, whether lineal or collateral, usually succeeded, it was by sufferance and not by right. Further, we think nothing can be pleaded in support of this right from what took place subsequent to the assumption of the Dewanny by the late East India Company, or at the time of the Decennial Settlement, for, on reference to the decision of this Court of the 12th May 1856, we find the following statement of pedigree which, we think, we are at liberty to make use of:—"Ramanath is the first tenant of the guddee mentioned, next his nephew, Ram Jeewan; then Ram Kissore, whose relationship to his predecessor is not to be traced; then Ram Kishore's son, Ram Singh *alias* Abdoor Ruheem; then his son Ram Singh; then Kishore Singh, the eldest son of Ram Singh, who was succeeded by his brother Raj Singh, who was the father of Rajah Bishunauth Singh and Rajah Jugurnauth Singh (and Rajah Gopeenauth Singh)." Now, from a previous paragraph of this decision, we learn that the plaintiff alleged and by a deed of gift, dated 1141 B.S. (not filed in the present suit) sought to prove that Ram Singh *alias* Abdoor Ruheem gave over the whole estate to his son Run Singh, having been prohibited by the Maho-

medan Government from dividing it as he intended. As the original deed of gift is not before us, we can form no opinion as to its genuineness or otherwise, nor are we required to do so; but from the recital in the above decision of this Court, we learn that Ram Singh received the zemindaree as a gift from his father in 1141 B. S. (1734 A.D.), some thirty years before the commencement of the East India Company's rule, and that the reigning power considered itself competent to interfere with its internal management. He was succeeded by his son Kishore Singh in 1160 Hijirah (1749), as may be gathered from that decision; and it may be presumed that he succeeded on the same terms as his predecessors, *viz.*, that he held it as a military fief, and he retained possession till his death in 1784, when his only brother, Raj Singh, on failure of lineal heirs, succeeded to the zemindaree, and was recognised as zemindar by the Government by the East India Company. In his time the Permanent Settlement was made, and he was succeeded by his three sons in 1822, so that, after the assumption of the Government by the East India Company till the time when the three brothers succeeded as joint proprietors of the estate, there was only one occasion on which the common law of inheritance might have been brought into exercise, but which was not then allowed to come into operation, as the succession had heretofore followed according to the pleasure of the ruler, the lands being held as a military fief, under which any claims of a widow or of younger members of the family would necessarily be disregarded. There is, however, one circumstance to which we have not hitherto made any reference, which appears to us to put it beyond doubt that this property cannot be considered as an indivisible Raj. Out of the sixteen annas of this property, two annas were in former days made over in gift by a former proprietor of the estate to his daughter as her dower, and her descendants retain separate possession of it to this day, and a separate settlement was entered into with them at the time of the Decennial Settlement. The date of this gift and the name of the grantor do not appear, but the fact is undisputed. Now, if any proprietor were able to alienate any part of the estate, and such alienation was considered binding by his successors, what becomes of the indivisibility of the estate, or of the family custom under which the eldest son or eldest male heir succeeded solely to the whole estate? Looking, therefore, at all the evidence which has been submitted in support of the plea of the existence of the family custom, the conclusion that we draw from that evidence is that the property is not an indivisible Raj, for we see that in one instance a partition did take place, which has been acquiesced in by all subsequent holders, and that one departure from a custom is, as laid down in the decision of this Court of 1856, sufficient of itself to destroy the custom if ever it existed; that succession to the property did not follow the law of primogeniture, but was regulated by the will of the sovereign power under which the nearest male heir was allowed to succeed, the lands being held as a military fief; that the divisibility of the estate is further shewn by the conduct of the sons of Raj Singh, who took possession as joint and equal sharers of the property, a fact which is altogether opposed to the existence of a family custom, for it is impossible to believe that, had such a custom been known, the eldest son would have foregone his rights, or that the younger sons would have sought a position to which they were not entitled. We hold, therefore, in concurrence with the Judges who passed the decision of the 12th May 1856, that there is no satisfactory proof of the existence of the family custom pleaded, and we may add that, so far as the present plaintiff is concerned, who is the representative of the plaintiff in that suit, his right to plead the family custom had been fully considered and rejected in the judgment of 1856; and that, by not prosecuting his appeal to the Privy Council, he, in fact, acquiesced in the correctness of that judgment, the effect of which was to set aside the earlier judgment of 1847, and that the accident of his having another party as the defendant in this suit, will not put him in a more favorable position than he held before, and enable him to support a plea which has once been decided against him by a Bench of three Judges, who were unanimous in holding that the evidence to prove the existence of the family custom was unsatisfactory and insufficient.

It is necessary also, before we conclude, to refer to the decision come to by this Court on 17th July 1847 by one Judge, who considered the family custom to be established, notwithstanding the previous alienation of two annas of the property. He admits that the property was held jointly by the three brothers from 1822, and that Huro Soondaree succeeded to the share of her husband, and paid the Government revenue, and exercised the powers of a proprietor. And then he adds:

"I do not think the neglect and supineness of the defendant (Bishunauth) in the management of his affairs, which has allowed the plaintiff to get her name entered, and to obtain a partial possession, sufficient to set aside the established usage of the family, which has been handed down for thirteen generations. Even if it be supposed that the defendant intentionally permitted the introduction of the name of the plaintiff into the collections (Collectorate?) as a sharer, it is to be considered that he had no authority to convey to her any right to the prejudice of his heirs; it was not optional with him to break through the family usage; and if the plaintiff (Huro Soonduree) has obtained a kind of possession, it can only be by sufferance and not by right. I think it, however, most probable that the plaintiff effected her object by intriguing with the defendant's servants and without his knowledge." We are constrained to differ entirely from the view thus taken by the Judge on this occasion, for we have no proof, nor is any referred to in the judgment, that Bishunauth Singh ever shewed any supineness in the management of his affairs; and certainly his conduct, after litigation began, does not warrant such a conclusion. Nor is there any proof that Huro Soonduree obtained possession by intriguing with the servants and without Bishunauth's knowledge, for such a supposition is most improbable. The position of a Hindoo widow contending for the preservation of her just rights is difficult enough, and she has little prospect of success, if she intrigue against the legal heir in possession to get what does not belong to her. As against Huro Soonduree, however, notwithstanding the subsequent decision of 1856, this judgment, it is urged, is binding against all who derive from her; but the present defendants, in this case, do not come in as heirs to her, but derive their title from her husband, whose descendants they are. The decision of 1856, though between Bishunauth and another party, virtually set aside the finding come to in the decision of 1847, and declared the family custom not to be established—a finding in which the present plaintiff aquiesced, as is shewn by his failure to prosecute his appeal to the Privy Council. And we think the defendants in this case, as descendants of Gopeenauth, are in a position to contest the existence of the family custom, a plea which the plaintiff has again taken up, and upon which he has rested his right, though it was declared untenable in the suit which Bishunauth and he brought in 1856.

We now briefly refer to the two points reserved for consideration after the main question at to the existence of the family custom was determined, *viz.*, limitation and the power of an heir to sue to restore a custom which, by the acts of his immediate predecessor, had been broken through. Having come to the conclusion that the family custom pleaded by the plaintiff does not exist, we think any adjudication on these points is unnecessary. As the plaintiff has failed, in our opinion, to establish the existence of the family custom, he cannot, under that plea, be successful in this suit; and, therefore, whether his action be brought within or after time is immaterial; nor can he, under the finding we have come to in regard to the family custom, take up and endeavour to establish his right to restore a custom, which, in our opinion, never was in existence, and we may add that the plaintiff's acquiescence in the decision of 1856 is strongly in favor of this view of the case. We find, therefore, on the three points in regard to which the case was remanded for further evidence, that there is no satisfactory proof of the family custom pleaded by the plaintiff; that if there had been, it was certainly waived by the sons of Raj Singh on his death in 1822; and that there is nothing in any one of the documents submitted to the Court, either before or after the British Government, which prohibit alienation, while at the same time we find that at a period previous to the British rule, alienation of two-sixteenths of the property did take place, and was acquiesced in by the successors. Looking also at the plaintiff's statement and evidence, we conclude that the property was, during the Mahomedan Government, a military jagheer resumable at pleasure, and not a Raj, and that the succession to it went on not by right or family custom, but by the will of the sovereign power. Under this view of the case we must reverse the decision of the Court below. The appellants will recover possession from the plaintiff, and mesne profits with interest for the period they have been deprived of possession, and we decree the appeal with costs.

The 25th January 1865.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Limitation—Suit for possession—Onus Probandi.

Case No. 2178 of 1864.

Special Appeal from a decision passed by the Judge of Purneah, dated the 28th June 1864, reversing a decision passed by the Officiating Principal Sudder Ameen of that District, dated the 7th October 1863.

Mirza Mahomed Hossein and another (Defendants), *Appellants*,

versus

Surahutoonissa Khanum (Plaintiff), *Respondent.*

Messrs. C. Gregory and *A. F. Lingham* for Appellants.

Mr. J. Baptist and *Moonshee Ameer Ali*, for Respondents.

When a defendant in possession pleads limitation, the plaintiff must prove a possession of the property by himself within 12 years prior to the date of suit, whatever may be the date of dispossession which he states in his plaint.

PLAINTIFF sued for the possession of certain land with mesne profits.

The defendant pleaded the Statute of Limitation against plaintiff, and also denied his right to the land claimed by him.

The first Court, after going into all the evidence adduced by the parties to show possession, was of opinion that plaintiff had never been in possession of the property claimed within 12 years prior to the institution of the plaintiff's suit, and he then dismissed the plaintiff's claim.

On appeal, the Judge found that the claim of plaintiff is not barred by the Statute of Limitation; that plaintiff states that her dispossession commenced from Bysack 1259 B. S., corresponding with 13th April 1851; that the suit was instituted on the 30th Chyet 1271, or 11th April 1863, consequently appellant is within time. The Judge, therefore, remanded the case to the Principal Sudder Ameen for investigation on the merits.

Defendant now appeals specially, urging that the Judge has erroneously calculated limitation according to plaintiff's plaint; that this is incorrect; that the Judge should determine limitation after having looked to the evidence of plaintiff as to her possession and dispossession, and, if necessary afterwards, to that of the defendants.

We are surprised to see the Judge of Purneah decide the question of limitation raised in this case simply by looking to the statement of the plaintiff. Such a proceeding shows either great carelessness or ignorance on the part of the Judge. When a defendant in possession pleads limitation as against a party suing for the same, it is necessary for the plaintiff to prove that he has been in possession of the property sued for within 12 years prior to the date of suit; and if he is unable to prove this, his suit must be dismissed. For the purpose of determining whether plaintiff is within time, all the evidence on the record regarding possession must be looked at, the defendant's evidence, if necessary, after that of the plaintiff, and an order passed after a careful consideration of the same.

The Judge's order of remand is reversed. He will recall the case from the Principal Sudder Ameen, and dispose of the defendant's plea of limitation in the mode above laid down.

The Weekly Reporter,

APPELLATE HIGH COURT.

No. 6.] MARCH, 1865. [Vol. II.

The 25th January 1865.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble C. B. Trevor, W. S. Seton-Karr, Shumboonath Pundit, J. B. Phear, E. Jackson, and F. A. Glover, *Judges.*

Lakheraj (Resumption of grants subsequent to 1790)—Aplicability of Regulation II, 1819—Jurisdiction.

Case No. 869 of 1864.

Special Appeal from a decision passed by Mr. J. E. S. Lillie, Additional Judge of Hooghly, dated the 30th January 1864, affirming a decision passed by Mr. A. Davidson, 2nd Principal Sudder Ameen of that District, dated the 14th April 1863.

Sonaton Ghose and others (Defendants), *Appellants,*

versus

Moulvie Abdool Furar (Plaintiff), *Respondent.*

Mr. R. E. Twidale and *Baboos Juggadanund Mookerjee, Unnoda Pershad Banerjee*, and *Toolsee Doss Seal*, for Appellants.

Baboos Dwarkanath Mitter and *Mohendrololl Shome* for Respondent.

The plaintiff, the purchaser of a putnee lease, sought to obtain a declaration of his mál right by setting aside an alleged rent-free tenure in certain lands held rent-free from the time of a former Talookdar, alleging that he had called for the defendant's documents, and as the defendants refused to produce them, the plaintiff instituted this suit before the Collector under Regulation II of 1819. The defendant pleaded a Lakhiraj title from before 1790. The suit was referred to the Civil Court under the Bengal Act VII of 1862, and the plaintiff obtained a decree.

On appeal by the defendant,—HELD *par totam curiam* that, prior to the passing of Regulation II of 1819, under their ordinary jurisdiction, the Civil Courts were competent to entertain regular suits by zemindars for the declaration of their right to resume revenue illegally, alienated subsequently to 1790, and for possession of the land held rent-free under grants or titles which had their origin subsequently to 1790.

HELD by Trevor, J., Seton-Karr, J., Shumboonath Pundit, J., and Glover, J., that such suits were unaffected by the passing of Regulation II of 1819, Section 30, which related only to resumption of Lakhiraj existing prior to 1790. *Dissentientibus* Norman, C. J., Phear, J., and Jackson, J., who held that since the passing of Regulation II of 1819, regular suits for the resumption of *all* tenures rent-free, in which the defendant alleged a valid rent-free grant, have been instituted, and, down to the passing of the Bengal Act VII of 1862 might have been maintained or referred to the Collector under the 30th Section of that Regulation.

HELD by a majority of the Court (*Dissentientibus* Trevor, J., Seton-Karr, J., and Glover, J.,) that the jurisdiction of the Civil Court to try this cause was not affected by Section 28 of Act X of 1859.

Mr. Justice Seton-Karr.—IN this case the point referred to our full bench is, whether the suit of a zemindar or other similar proprietor of lands, to resume lands illegally usurped as rent-free, since the first of December 1790, ought to be instituted before the Collector, or before the Civil Court; and whether, if it ought, in the first instance, to be instituted before the Collector, there is a concurrent or a subsequent jurisdiction on the part of the Civil Court. Or to put the matter in a slightly different shape, we have been asked to consider whether such a suit is cognizable by the Civil Court under Section 30, Regulation II of 1819, or not; and, if not, whether the jurisdiction of the Collector, under Section 28 of Act X of 1859, is exclusive, or concurrent with that of the Civil Court.

The case was very fully argued for two days and a half, and, indeed, a great deal of unnecessary matter and of redundant argument was introduced into the discussion.

The facts of the case referred to us are quite simple. The plaintiff sued, in the Civil

Court of first instance, to get a declaration of his right to assess lands illegally held, as he said, rent-free, the same having been usurped by the holders, from the plaintiff's predecessors, the former Talookdars, after 1790. The defendants pleaded a valid rent-free title, existing not only previous to 1790, but previous to 1765. They failed to prove this plea, and both Courts gave plaintiff a decree.

In special appeal, Mr. Justice Steer and Mr. Justice E. Jackson referred the case to a full bench, because there seemed to be a considerable difference of opinion amongst the Judges in similar cases variously decided by them, having reference to this very point. The reference, as already noticed, was intended to settle the form in which actions avowedly brought to resume lands usurped since 1790 could or should be instituted. In the present case, it is important to note that the suit was instituted on the 31st of December 1861, or on the last day of the old Law of Limitation, which was superseded by Act XIV of 1859, (the operation of which was postponed until the 1st of January, 1862); and that the suit was brought after the passing of Act X of 1859.

The Regulations and Laws most quoted in this discussion, the tenor and scope of which it becomes necessary to discuss and examine very closely, are given in the margin.

Reg. XIX of 1793.
„ II of 1819.
„ IX of 1825.
Act X of 1859.

The first law, XIX of 1793, is a law passed for trying the validity of the titles of persons holding or claiming to hold lands exempted from the payment of revenue to Government; and the first Section lays down clearly what is the ancient and common law of the country on this important matter. It then divides the grants, alienating public revenue into three classes; (1) grants previous to the Dewanny or to the 12th of August 1765; (2) grants between this date and the 1st of December 1790; (3) grants made after 1790.

With the first class of these grants, the present discussions have nothing whatever to do, and only incidentally does the discussion touch on the second class. Between the two first classes and the third class the law draws a marked distinction. By Section 6 of the law, *the revenue*, assessable on grants of the second period, when not more than 100 beegahs in extent, is declared to belong not to Government, but to the person responsible for the discharge of the revenue of the talook or estate within which the grant is situated; and the proprietor is declared on this account not to be subject to any extra payment of revenue. It has been shewn to us incidentally that in the old Rules of 1789, the word rupees was used instead of the word beegahs; and it is natural to infer that the subsequent designation of beegahs, as marking the extent of the land, was used because each beegah might be held, roundly, to be liable to one rupee of revenue.

By the next Section (7) it is clearly laid down that all the revenue on grants of more than 100 beegahs in extent, alienated before 1790, should belong, not to the zemindar or talookdar, but to Government; and that these lands should constitute independent talooks after resumption.

Section 10 of this law is the remarkable Section out of which the present contention has mainly sprung. It rules that all grants made after 1790, December 1st, whether under or above 100 beegahs in extent, made by any other authority than the Governor General, are absolutely null and void; that all proprietors, of whatever sort, are "required and authorized" to collect the rents from such lands at the pergunnah rates, and to *dispossess* the grantee from the same, without making any application to a Court of Judicature or to Government; and it declares that no such proprietor shall be liable to any increase of assessment on account of any such grant which he may resume and annul.

The distinction which the Legislature intended to draw in this Section is, I think, sufficiently obvious. The permanent settlement had been made with the zemindars, and their status as proprietors had been recognized. Any grants made by any other authority than the Governor General, were, in such estates, *ipso facto* null and void. In the term "grants," must also, I think, in all fairness, be included any usurpations or encroachments made by any subordinate holder of the land under the pretext that they were grants; and it was by considering the status of zemindars, and proprietors, which had been so recognized by law, that such persons were not only permitted but required to look after their estates; that they were considered bound to see that the area on which rent was due, and from which revenue was eventually payable, should not be impaired or diminished; and that they were permitted, without any formality or any application to the authorities of any sort, then and there, even by force, if necessary, to dispossess all fraudulent or illegal grantees and to re-annex the usurped property to its parent estate. The zemindars, in this view, were only enjoying their own again. They had as much right to re-annex a tenure, impudently or fraudulently

set up as rent-free, but in reality created or usurped after 1790, as they would have had to re-capture a stray horse or cow. After 1790 there could, it is clear, be no such grants, whether by Nawabs, Amils, Farmers, or proprietors of any kind. None but the Governor General in Council could from that date alienate the revenue, or what was practically the source and foundation of revenue, namely rent.

It is probable, however, that such attempts at usurpation, by sub-tenants, were few in number. Perhaps, on the other hand, if any such encroachments were made, the zemindars feared that dispossesssion by the strong hand, would fail in the result, or might lead to resistance and violence; or it might be that a zemindar could not distinguish between grants created before, and grants created after, 1790; and that, when they did endeavour to resume, they preferred challenging all grants, as held by invalid tenure, in uniform, general, but positive terms, without specification of the date of origin. Again, it may be that very little was done comparatively in the way of resumption by Government until the passing of the Resumption Laws of 1819 and of 1828, and that the zemindars, following in the wake of Government, themselves did little or nothing, until later years. Religious prejudices may also have had their full sway, and respect for Brahmins may have prevented zemindars frem closely scrutinizing the titles by which Bromuttor and Devuttur, and even other tenures, were held. Certain it is that, from whatever cause, for a long time, we heard little of Section 10, except in theory. Quarrels and affrays have not, as I hold, been due to this portion of the law in any marked degree, or in greater proportion than they are due to other well-known causes of agrarian disturbance. And it is also tolerably certain that institutions of suits for Resumption by zemindars have been numerous enough to attract attention, and to create a distinct branch of law and of litigation, only since the year 1848. After that date, and again after the year 1855, the proprietors of estates in the Lower Provinces, following the example of two or three well known and energetic zemindars, have generally betaken themselves to enquire into the origin of their grants, and with a growing disregard of religious prejudices and of ancient custom, have resolutely set themselves to increase the rent-paying area of their estates,as they had a perfect right to do, by every means which the law had placed within their reach. All this it is necessary to premise for a full understanding of this part of the subject.

We now come to the next law of importance, the well known Regulation II of 1819.

Till that time, it is clear, from the Preamble of the law, that the existing laws had been inadequate to secure the just rights of Government, and similarly, we may add, of those to whom Government had delegated a portion of its rights. The Preamble recites the object of the law to be, the declaration of the right of Government to assess all lands, which, at the Decennial Settlement, were *not* included within the limits of a settled state, and at the same time to renounce all claim on the part of Government to additional *revenue* from lands included within the limits of a permanently settled estate. In this view, one uniform course of law and procedure was laid down. The first 29 Sections of this law are wholly taken up with the procedure and forms to be adopted by *Government* in the resumption of its own rights. But the 30th Section embraces the cases of *proprietors* in regard to lands which they could resume. It would seem as if the Legislature, after minutely laying down rules for the action of the Revenue Authorities, charged with the preservation or the resumption of the rights of Government, had also thought that time and trouble would be saved by prescribing, in one and the same law, the rules whereby private, as well as public, claims should be instituted, tried and adjudicated. Section 30 declares that all suits instituted by proprietors, &c., to the *revenue of any land free of assessment*, shall, immediately on their institution, be referred to the Collector for report; and that proprietors who deem themselves entitled to the revenue of any land held free of assessment on their respective estates, shall be at liberty to prefer their claim, in the first instance, to the Collector. The remainder of the Section is wholly taken up with the procedure in such cases, and need not be now adverted to.

Now, what is to be understood by the term "revenue of any land held free of assessment," which occurs twice in this Section? Did the suits, contemplated on the part of proprietors, include both suits for lands held under grants anterior to 1790 and suits for lands usurped or granted away since that date? Is the word *revenue* in this Section to be understood as meaning the revenue due to Government, which had been assigned to the zemindar; or is it a careless term meaning the rent which proprietors could levy on the ground of their existing status and rights? And, finally, ought suits for the assessment of lands for the

first time held, granted, or usurped, after 1790, to have ever been held under this Section or not? And if suits have ever been so tried, then, is the jurisdiction of this Section curtailed or taken away by the provisions of Section 28 of Act X of 1859?

This really is the gist of the whole controversy. I am of opinion, after the very fullest consideration, that the arguments in favour of a concurrent jurisdiction for the Civil and the Revenue Courts in regard to this Section, and for the retention of such concurrency even after the passing of Act X, are inferior in number, weight, and fulness to the arguments; that, to resume grants of a later date than 1790, one Court and one only, that of the Collector, is intended as the correct and legal tribunal. Section 30, to my mind, contemplates the zemindar or talookdar in the position of the assignee of the *revenue* due to Government on lands of less than 100 beegahs in extent. It does not contemplate him as resuming the *rent* of his own lands, which had been illegally or fraudulently usurped, or denied to him by his own tenants residing on the estate, which was settled with him at the perpetual, and, consequently, at the Decennial Settlement of 1789. The word *revenue* was used knowingly and advisedly. This, I think, is to be inferred from the whole language and scope of the Act. Its first 29 Sections prescribed the rules whereby Government shall recover its alienated revenue. The 30th Section similarly prescribes rules whereby zemindars shall recover that portion of the *revenue* which Government, in its generosity, had conceded to them, and to which they could have had no title, were it not for such liberality on the part of Government. Section 10 of the law of 1793, already quoted and explained, is not mentioned, and was never contemplated by the framers of Regulation II of 1819, although other Sections of that law are thereby rescinded in express terms. The Section remained in force and unaltered until Section 28 of Act X displaced it, and substituted for the firm hand and for the possible violence of the zemindar, a more sober, formal, and regular mode of ejectment. Section 30 of Regulation II of 1819 does not contemplate *ejectment* at all, but assessment; whereas Section 10 of the law of 1793 directly contemplates an act of ejection and dispossession. Section 30, and the whole of the law of 1819, contemplates liability to assessment, and not the ejectment and dispossession of illegal or usurping grantees. This much, I think, every one must concede.

It is said, on the other hand, that zemindars have been allowed to bring suits under Section 30 for both kinds of lands, *i. e.*, those taken before and those taken after 1790; and that, further, any zemindar who prudently did not wish to resort to force to oust the latter kind of tenants, had, at any rate, his remedy for his wrong under an ordinary civil action, independent of the Resumption Law of 1819, and such as was permitted to all persons injured, under Regulations III and IV of 1793, or our earliest Civil Code. I concede that it is quite possible that suits to resume lands taken after 1790, may have been carelessly admitted under Section 30 of Regulation II of 1819. But the truth, as I take it to be, is that, until a very recent period, zemindars suing to resume and assess, used a general and a vague language as to time. They stated in their plaints broadly that such and such lands were held "under invalid (Nâjâiz) Lakhiraj tenures," and invoked the aid of the Courts. The marked distinction in dates has been, I firmly believe, of recent introduction, and perhaps subsequent to Act X of 1859; and if we find that some suits have been carelessly admitted, that the point has never been fairly and fully argued until very lately, and yet that the legislature has prescribed certain remedies which are to be the sole remedies for a particular class of wrongs, what, I would ask, is there to hinder us from considering the subject, and from laying down a precise rule for all future and for all pending cases?

I cannot admit the conclusiveness of the arguments on the other side of the question, admitting that much may be said against my view of the case, to the effect that it has lately been the practice to admit both classes of suits, to trial under Section 30.

Then, what is the meaning of the reference to the Collector and to the Board throughout the whole of the law of 1819, and specially in Section 30?

The Collector was the sole Registrar and depository of papers and titles by which the revenue of Government was affected. He was naturally supposed to be the most competent authority to determine in what cases Government, or those to whom Government delegated its powers, might claim revenue unlawfully withheld or appropriated. He was by some supposed to possess a perfect monopoly of knowledge in regard to revenue and land tenures. But I do not see why the Collector should be supposed to know at what period, or by what process, rents and not revenue, due on lands

situated within the limits of a decennially settled estate, with which the Collector had no practical interference, had been illegally appropriated by some fraudulent tenant. The zemindar was the person who could see after his own affairs, who could best know the limits of his own estates, and the extent of the misdoings or usurpations of his ryots; and if he had no means of ascertaining these points, the Collector was not the person to give him any material assistance. The zemindar would certainly find in the Collectorate the quinquennial registry papers, and the papers showing of what mouzahs an estate consisted at the Perpetual Settlement; but all this he was supposed to have in his possession already. On the other hand, to call in the aid of the Collector to point out what lands were liable to *revenue*, and by what titles or grants they were held, was, according to the ideas of the Legislature of 1819, perfectly reasonable and proper. To send zemindars to the Collector, in order that he might help them to ascertain all about their defaulting tenants, and the deficiencies in their rent roll, was wholly unnecessary. Such alienations, by the Section of a law never changed until the passing of Act X of 1859, were, on the face of them, null and void. What was then left for a Collector to enquire into, ascertain, or report? And to what portion of any enquiry about nothing could the long and elaborate processes of the swelling Clauses of that same Section, which make up two pages of Clarke's Edition, by any process of reason or analogy of law, be taught to apply? I cannot accept the argument that the word "*revenue*" in Section 30 is used indiscriminately as expressing *khazana*, which means both revenue and rent. The framers of the law of 1819, according to my idea of their capacities and intention, knew perfectly well the force and significance of the terms which they were using, and made use of *revenue* in its ordinary significance, *viz.*, that which is due to Government from the land. The word *rents*, on the other hand, is pointedly used in Section 10 of Regulation XIX of 1793, as being what zemindars are required to collect as their own already.

That no interference with Section 10 of Regulation XIX of 1793 was contemplated by the framers of Regulation II of 1819, seems to me, further, to be conclusively established by a reference to Regulation IV of 1825, Section 8. This Section specially provides that nothing in Regulation II or in any other Regulation in force, shall affect, *or be considered to affect*, Section 10 of Regulation XIX of 1793, which declares the right of zemindars to make use of no Court at all, but only of the services of their own Naibs, Gomastahs, and retainers. And the Section goes on to reserve to the Revenue Authorities the right to resume lands now held free of assessment, but subject to payment of revenue at the date of the Perpetual Settlement, as well as to except the cases in which the revenue might belong to the proprietors or others *with whom a permanent settlement had been concluded*, *i. e.*, cases of lands on which rent-free grants had been set up after 1790. The Section concludes by saying that the provisions of Section 22 of Regulation II of 1819 (allowing rent-free holders to remain in possession on tendering security, pending the suit which they were to institute to retain their tenures) *shall not apply to such cases*.

Having thus shown, as I hold, that the intermediate and well known law of 1819 had no reference whatever to grants after 1790, and consequently that any such cases instituted under its provisions must have been admitted through inadvertence or from mere want of distinctness or perspicuity in the claims, I come now to Section 28 of Act X.

In my view of the case there is, then, nothing in our legislation which touches these cases in the whole period between 1793 and 1859. We go *per saltum* from the vigorous and off-hand dispossessing zemindar of 1793 to the same individual applying to the Revenue Authorities in 1859.

In that year a law was passed which, from its Preamble, and its whole scope, was intended to provide for all rights of zemindars and ryots, and all questions arising out of rent, and to form, as far as possible, a complete and definite Code in itself.

Now, what is the language of Section 28 of this Act? It simply repeals Section 10 of Regulation XIX of 1793, and rules that "any proprietor or farmer who may desire to assess such land or to *dispossess* any such grantee (*i. e.*, a grantee after 1790), shall make application to the Collector, and such application shall be dealt with as a *suit* under the provisions of this Act." The Section then goes on to say that, such suit shall be instituted within 12 years, from the time when the title of the plaintiff accrued, &c.

In the above language there is nothing permissive, nothing which suggests the notion of a double forum or of a subsequent remedy in the shape of a civil suit, such as is by other Sections of Act X

reserved for parties whose titles or rights cannot be decided by the Collector. The period of limitation is no short period, but the longest which any of our laws permit. The terms used are as positive and peremptory as language can afford. The law says, as I read it—"You shall no longer oust alleged grantees who have usurped your lands, or who deny you that rent which they or their predecessor paid to your estate or to your representatives after 1790. Such proceedings are far too arbitrary for our improved civilization and our more frequent and more accessible tribunals. You *shall* now go to the Revenue Authorities, and your application to them *shall*, in all respects, be treated as a *suit*; and a suit is not to be tried twice over."

A full bench of this Court has already ruled that appeals from orders passed under this Section lie to the Judge, and not to the Commissioner.

It is argued, on the other hand, that Act X never takes away the jurisdiction conferred by Regulation II of 1819, and that jurisdiction cannot be taken away by implication, nor a Court be thus inferentially deprived of its legal powers. But what if civil jurisdiction had never been contemplated at all for such cases by Regulation II? And I have endeavoured to show that the jurisdiction of Courts under that law could not, and did not, extend to such cases.

The jurisdiction of Regulation II of 1819 was finally abolished by Act VII of 1862 of the Bengal Council,—an Act intended to put an end to all those vexatious enquiries regarding lands held free of revenue, which were productive of no good financial or political results.

If the arguments against this view be correct, then, have plaintiffs, seeking to resume these grants, no less than three tribunals or forms of action, now that their own freedom of action has terminated.—(1) They can go to the Collector to dispossess the alleged grantee. (2) They can sue for resumption and assessment, under Regulation II of 1819, in all suits instituted before the Act of 1862. (3) They can resort to the Civil Court under the general law, like any other plaintiff who has sustained a wrong and who desires a remedy. I cannot think that this diversified course of procedure, and this unfettered freedom of action in the choice of tribunals, were ever contemplated by the Legislature, or are to be extracted out of the words of any law. I cannot think that this course would tend to uniformity of procedure and of decisions, to the satisfaction of a large class of the community, to a general confidence in our tribunals as a sure means of redress, to the ends of justice, or to that character for fairness, equity, and consideration for the people, which it was the object of the Government that passed these Acts to obtain. It may be said, certainly, that the last resource of those above enumerated, the ordinary civil action exists for every man, and that whether the Resumption Law of 1819 be applicable or not, the ordinary form of redress by civil action was never barred, and is not even now taken away. This argument I take to be purely theoretical. Plaintiffs did not sue to assess or to resume lands under the ordinary civil law. I question if more than one or two such cases can be cited. Plaintiffs came to the Courts under the well known Resumption Law, and, in any case, I hold that it was the intention of Act X of 1859 to give sole and exclusive jurisdiction to Collectors, and to make a suit before him the one single remedy for aggrieved or injured zemindars.

This view of the case has already been entertained by several Judges in late cases, though the contrary opinion has also been expressed. It is now most requisite that parties resorting to our Courts should know what courses they may or may not pursue.

On the whole, I would now sum up the question by saying that, in my opinion, Regulation 11 of 1819 was never intended to apply to these cases at all; that the distinction between grants made *before*, and grants made *after*, 1790, was rarely if ever raised until late years, by plaintiffs seeking to resume, inasmuch as they brought these suits on broad and general terms, alleging mere illegality and invalidity of rent-free tenure; that the permission given by the law of 1793 to zemindars, to re-annex lands to their estates off-hand, was by comparison rarely resorted to in practice, but was left quite untouched in theory until the enactment of 1859; that Act X of that year at length substitutes for the peremptory dispossession permitted to the zemindar, or for any possible civil suit under the general Regulation the more regular and formal course of an action before the Collector; that this law leaves plaintiffs no option but to go before the Collector, and before no one else; that there is no subsequent trial or further remedy by civil suit left open, and that this is the only remedy to which parties have a right to look.

In this view I would decree this appeal, and

would, moreover, rule that this decision should apply to all pending and future cases of the kind, shutting out the action of the Civil Court altogether; but I would not, on this ground, review any decison already passed under a different interpretation of the law.

The Chief Justice.—This was a suit by the plaintiff, who was the purchaser of a Putnee, instituted under Section 30, Regulation II of 1819, for the resumption of and declaration of the mâl right of the plaintiff in certain land alleged by the plaintiff to be held by the defendant under the false allegation of its being rent-free.

The plaint was filed in the Collector's Court on the 30th December 1861, and subsequently transferred to the Civil Court in pursuance of the provisions of the Bengal Act VII of 1862. The defendant set up Lakhiraj title prior to August 1765, and 1st December 1790, which he failed to prove. The plaintiff obtained a decree in the Lower Courts and the point raised in appeal before us is that, the present suit having been instituted after the passing of Section 28 Act X of 1859, the Court had no jurisdiction.

By the ancient usage or common law of the country, which was recognised and continued by the Regulations of 1793, the dues of Government from each beegah of land were inalienable by the persons appointed to collect them, namely the zemindars, except by its express sanction.

Section 10 of Regulation XIX of 1793 is as follows:—"All grants for holding land exempt from the payment of revenue, &c., that have been made since the 1st December 1790, or that may hereafter be made by any other authority than that of the Governor General in Council, are declared null and void; and no length of possession shall hereafter be considered to give validity to such grant either with regard to the property in the soil or the rents of it." It goes on—"And every person who now possesses or may succeed to the proprietary right in any estate, &c., or is authorized and required to collect the rents from such land at the rates of the pergunnah, and to dispossess the grantee of the proprietary right in the land, and to re-annex it to the estate or talook in which it may be situated, without making previous application to a Court of Judicature," &c.

Therefore, in respect of lands held within a decennially settled estate, rent-free under a grant subsequent to 1790, the zemindar had a right to the revenue under the ancient common law of the land, and to the possession of the land itself, under Section 10 Regulation XIX of 1793.

The Regulations respecting Lakhiraj lands passed by the Governor-General in Council on the 1st December 1790—(*See* Colebroke's Digest of the Regulations, Vol. 3, pp. 292-294)—after making provisions with respect to rent-free lands alienated prior to the date of those Regulations by Section 8, provides as follows:—"Any person who may purchase a village, or villages, &c., subsequent to the date of these Regulations, shall be entitled to the property in the soil, and the Government's share of the produce of all portions of such village or villages that may have been alienated since the date of these Regulations," &c.; and by Section 11 he was authorized "to prosecute for the same in the Court of the Collector of the district," and any landholder resuming lands without having obtained a decree for that purpose from the Collector of the district, was made liable to a prosecution for damages in the Court of the Dewanny Adawlut.

Section 10, Regulation XIX of 1793, with a view of carrying out the objects of the Government in securing to, and retaining in the hands of, the zemindars the revenue which they were to receive, authorized and required them to "resume;" or, in other words, to retake possession of such lands without a suit. But, as the Regulation contains no Clause depriving the Civil Court of jurisdiction, it appears clear that it did not take from the zemindars the right to enforce their claims, whether to the revenue under the common law of the country, or to the land under the above cited Regulation, if they found it necessary or convenient to proceed in that manner. It would therefore appear that, prior to the enactment of Regulation II of 1819, a zemindar might either himself collect the rents and dispossess the grantee of any lands, parcel of his decennially settled estate, held rent-free under a title which had its origin subsequent to 1790, or he might sue in the Civil Court to enforce his rights.

By Section 30 Regulation II of 1819, all suits preferred in a Court of Judicature by proprietors to the revenue of any land held free of assessment, were to be referred to the Collector; and special rules are provided for the trial of such suits. This Section fixes no new right of action; it simply provides a special mode of trial for certain suits which might have been instituted and tried before its passing by the ordinary Courts.

As stated by Mr. Loch, in Gobind Chunder

Gossain *versus* Woomes Chunder Roy, S. D. A. Rep., 15th April 1861, "zemindars found it more convenient to proceed under these rules than to take advantage of the powers with which they were invested by Section 10 of Regulation XIX of 1793;" and according to the established and recognised course and practice of the Court for many years *prior* to the passing of Act X of 1859, suits under that Section were brought and maintained for the resumption of all Lakhiraj lands without distinction, whether the grants were prior or subsequent to 1790.

It was a well recognized rule established after much discussion, that limitation could not be successfully pleaded in such suits, unless it were shown that the Lakhiraj was held under a grant prior to 1790.

Now, it is evident, that, if no suit under that Section could have been maintained except in respect of grants prior to 1790, the plea of limitation would have been an answer to the suit in every case, except in suits by purchasers at sales for arrears of Government revenue, because the plaintiff would have been in this dilemma—either this suit was for the resumption of a grant prior to 1790, in which case limitation would be an answer; or it was in respect of a grant subsequent to 1799, in which case the Collector's Court would have had no jurisdiction.

We have not now to consider whether, upon a careful and critical consideration of the Preamble and general scope of Regulation II of 1819, this construction was correct. There is much to be said on either side of the question. It is sufficient to say that the terms "suits to the revenue of any land held free of assessment" are sufficiently large to include such suits. Indeed, if the words "held free of assessment" were to be treated as if they related only *to lands which had never been assessed*, instead of as including all lands *de facto* held free of assessment, or, in other words, without actual payment of any assessed revenue, the inconvenience would have followed that a suit against a person alleging himself to hold a Lakhiraj title would be liable to be dismissed on the ground of want of jurisdiction, if, on enquiry, it turned out that the party alleging Lakihrah title had no ground whatever for resisting the suit, the sunnuds having been forged, and the land first held rent-free since 1790. It may well be that, if neither party allege a Lakhiraj title as existing prior to 1790, there would be nothing to refer to the Collector under Section 30 of Regulation II of 1819; but that is not the present case.

The interpretation which has been put upon the Section in question is not only perfectly reasonable, but having been for so long a period recognized and acted upon by the Courts, in my opinion we are bound by it, and it has now the force of law. *See* on this subject the observations of Sir Henry Seton, in Sibchunder Ghose *versus* Russick Lall Newgy, Fulton's Reports, page 39. Sir Lawrence Peel, C. J., in Sibchunder Doss *versus* Sibkissen Banerjee, 1 Boulnois' Reports, page 77, quoting the language of that learned Judge, says: "The laws of a people are not to be found merely in its written text, but in the judicial expositions of that text which have prevailed for a long series of years, and on which the laws of property are founded." He goes on to say in the case of the Regulations he was discussing:—"The construction which has prevailed in the Mofussil, namely, that adverse possession for the prescribed period, not only bars the remedy, but gives title, is in harmony with the presumable will of their framers, with the opinion of the most able jurists on laws as to real estates similarly worded, and with the whole course of decision on analogous branches of English Law. Had it been otherwise, a long course of decisions, settling rules of property on which titles are taken, ought not to be disturbed by judicial decision."

By Section 28 Act X of 1859, "so much of Section 10 Regulation XIX of 1793, as authorizes proprietors and farmers of estates and dependant talooks, in cases in which grants for holding land exempt from the payment of revenue have been made subsequent to 1790, of their own authority to collect the rents of such lands, and to dispossess the grantee of the proprietary right in the land, and to re-annex to the estate or talook in which it may be situate, is repealed."

Stopping here for a moment, we observe that the 1st Clause of Section 10 of Regulation XIX of 1793, is left wholly untouched, and that the new and special remedy given by that Section to the zemindar is the only thing which is in express terms taken away. It proceeds:—"And any proprietor or farmer, who may desire to assess any such land or dispossess any such grantee, shall make application to the Collector; and such application shall be dealt with as a suit under the provisions of this Act. Every *such suit* is to be brought within twelve years, or two years from the passing of the Act."

The construction which has been put by many decisions of this Court upon this part of the Section, is that it merely substitutes an

application to the Collector in the nature of a summary proceeding for the right which a zemindar had, of his own authority, to assess and collect rent or dispossess the holder of such land, and that it did not affect the right of the zemindar to proceed in a regular suit for resumption.

Act XIV of 1859 was before the Legislature at the same time as Act X of 1859, and received the assent of the Governor General only five days after the passing of Act X Clause 14 of Section 1 is *in pari materiâ* with Section 28 of Act X of 1859, and must be read with it. It gives a period of twelve years for suits for the resumption of any Lakhiraj or rent-free land, and provides that, in estates permanently settled, no such suit, though brought within twelve years, shall be maintained, if it be shewn that the land was held rent-free from the period of the Permanent Settlement.

It is clear that the Legislature contemplated the existence of, and separately dealt with, two classes of regular suits for resumption; namely, *first*, suits for the resumption of Lakhiraj created subsequently to 1790; and, *secondly*, suits in respect of grants prior to that date.

Again, the Bengal Act VII of 1862, which received the assent of the Governor General on the 1st day of May 1862, dealing with suits regarding lands held or claimed to be held free of assessment, repeals Section 30 of Regulation II of 1819; and after reciting that "it is advisable that such suits should be preferred and disposed of exclusively in the ordinary Courts of Civil Judicature," makes provision for that purpose.

Now, if the construction contended for by the appellant is correct, no such suit could be preferred after the 1st of January 1862. The Legislature itself has therefore adopted and acted upon the doctrine so long established in the late Sudder Court, that regular suits are maintainable for the resumption of land held as rent-free under titles which had their inception subsequent to 1790.

I am therefore of opinion that Section 28 of Act X of 1859 does not touch the right of a plaintiff to institute a regular suit for the resumption of grants falling within Section 10, Regulation XIX 1793, and therefore that the Civil Court had jurisdiction in the present case.

Mr. Justice Trevor.—The plaintiff in the suit referred to us, sues to resume Lakhiraj land, which, as he alleges, was formerly mál land, paying rent, but for which the defendant now fraudulently sets up a Lakhiraj title. In other words, plaintiff alleges that land for the resumption of which he sues had become Lakhiraj since 1790, and therefore is liable to bear rent, it being a portion of his decennially settled estate; and the questions raised before us, are—

1*st.* Whether such a suit is cognizable under Section 30 of of Regulation II of 1819, or not?

2*nd.* If not cognizable under Section 30 of Regulation II of 1819, then is the jurisdiction of the Collector's Court under Section 28 of Act X of 1859, an exclusive one in such cases, or has it only a concurrent jurisdiction with the ordinary Civil Courts?

It appears to me that points were brought before us in argument on the part of the plaintiff, the consideration of which is not necessary to the solution of the question before the Court. I shall therefore pass them by, simply noticing those points which are in my opinion necessary to the elucidation of the point before the Court.

In determining the point before us, it will be necessary to enter into a short statement of the law as it existed before the enactment of Regulation II of 1819.

It would undoubtedly suffice to commence this statement with the laws enacted in 1793; but, as reference has been made by the pleader for the plaintiff to the laws which existed before that time, it will be well to take some notice of them.

In the years 1772 or 1779, B. S., that is, seven years after the East India Company acquired the Dewanny of Bengal, Behar, and Orissa, the zemindars and farmers of revenue were bound, by an express clause inserted in their leases, not to confer any grants of land without the knowledge and consent of Government. They, however, violated this stipulation with impunity, and, as by the practice, the revenue of the Government was affected, an Office for the registration of all lands held free of revenue, whether under Badshahee or Hookamee grants in Bengal, styled the Bazee Zumeen Dufter, was proposed by the Committee of Revenue on the 28th May 1782, instituted under the orders of the Governor General in Council, in the Revenue Department, passed on the 31st May of the same year.

The main rules passed for deciding on the validity of the title of parties to hold lands free from revenue, were—

See Colebrooke's Digest of Regns. Vol. III., page 229.

1*st.*—That all grants anterior to 1765, and of which possession for one year had been held before that time, should be considered valid;

2*nd*.—That possession of that nature, even without a grant, was valid; and

3*rd*.—That all grants subsequent to that date, under the general denomination of Lakhiraj or Gair Jumma, should be declared invalid, excepting such as had been confirmed or might be hereafter confirmed by Government.

The decision as to the validity of the titles, and also the property in the land, if disputed, was to be reported by the Superintendent of the Bazee Zumeen Dufter to the Committee of Revenue, with whom the ultimate decision rested.

The Office of Bazee Zumeen Dufter was abolished in its original form on 31st May 1786, and it continued to exist only as Presidency Office of Record until February 1793, when it was entirely abolished. But, on the 19th July 1786, it was resolved to invest Collectors with the duty of investigating and reporting on Lakhiraj tenures.

On the 18th September 1789, the original rules for forming a Decennial Settlement for Bengal were passed, the Settlement itself commencing from the 1st Bysack 1197, Bengal era (Section 2, Regulation VIII of 1793), or 1st April 1790. On 1st December 1790, certain Regulations were passed respecting Lakhiraj lands. They confirmed and laid down with greater precision the Rules of 1782, and they adduced certain new ones, some of which it is necessary to mention. The 5th and 6th Rules are to the following effect:—The revenue which may be assessed on all rent-free lands, consisting of one or more villages, and on portions of villages (provided the sum assessed on such portion shall exceed *one hundred Sicca Rupees per annum*) alienated prior to the date of these Regulations, and which may be resumed in conformity thereto, is hereby declared to belong to Government, and the revenue assessed on portions of villages alienated prior to the date of these Rules, and resumed in conformity with them (provided the amount does not exceed one hundred Sicca Rupees) is declared to belong to the person responsible to Government for the revenue of the village, whether zemindar or farmer. Rule 8th lays down that any purchaser of the villages *subsequent* to the date of the Regulations, at public or private sales, shall be entitled to all property in the soil, and the Government share of the produce (whether it be more or less than 100 Sicca Rupees per annum) of all portion of such village or villages that may have been alienated *since the date of* this Regulation and prior to his purchase; and he shall not be liable to any increase of assessment on account of such lands during the term of his lease. By Rule 11, landholders and farmers entitled to the property in the soil or to the whole or part of the produce of alienated villages resumable by this Regulation, are authorized to prosecute for the same in the Court of the Collector of the district; and any person resuming alienated lands, without having first obtained a decree, is liable to a prosecution for damages in the Court of the Sudder Dewanny Adawlut.

See Colebroke's Digest of Regns., Vol. III., page 293.

These Rules remained in force until the enactment of Regulation XIX of 1793 on the 1st May of that year, when, in modification of the previous Rules by Sections 6 and 7 respectively of that law, it was enacted that the revenue of land *not exceeding* 100 beegahs of the ordinary measurement of the Pergunnah, alienated by one grant prior to 1st December 1790 on resumption, should belong to the person responsible to the discharge of the revenue; whereas that assessment on land *exceeding* 100 beegahs shall belong to Government, and the holders of the former tenures were to be considered dependant talookdars, leaseholders, that is, under the proprietors of the estate in which the lands are situated, whilst the holders of the latter were to be considered independent talookdars, entitled to enter into a settlement with Government for the land of which they are to be considered the owners. By Section 10, all grants made *since 1st December* 1790, whether above or under 100 beegahs, are declared null and void, and no length of possession can give validity to such grants either with regard to property in the soil or the rent of it; and zemindars are authorized and required to collect the rents for such lands at the rate of the Pergunnah, and to dispossess the grantee and re-annex it to the estate to which it belongs, without any application to a Court of Judicature. And by Sections 11 and 12, zemindars and Government could severally sue in the Civil Court to resume the land to the revenue of which they had been declared entitled by Sections 6 and 7; and zemindars were declared liable to an action for damages if they subjected lands to the payment of rent without having obtained a decree. It may be observed too, that no lapse of time barred the Government claim then. This law (Section 2) was, however, rescinded by regulation II of 1805, which prescribed a limit of 60 years to such claims on the part of the Government.

Now the foregoing statement shows clearly

that, in the Rules of the 1st December 1790, the principle of lightening the general assessment of an estate by assigning to its owner or occupant the revenue of small resumed tenures, and thereby rendering more secure the revenue of Government on the whole estate, is fully recognised. In Regulation XIX of 1793, the same principle is asserted: but the mode by which it is worked out, is altered. The former Rules looked to the amount assessed on land resumed, as determining whether it should be made over to the settling party, be the zemindar or farmer. The latter looked to the area covered by the grant which had been declared invalid. The reason for the change is, perhaps, to be found in the altered circumstances of the zemindar. Under the Decennial Settlement, as originally made, though he had been declared the owner, yet the Settlement was not in perpetuity; but when the Decennial became a Perpetual Settlement, the area of the estate became fixed for ever, and any rule for making additions to that area could be made with greater propriety by looking to the extent of land resumed than to the amount assessed on land; in other words, by a direct, rather than by an indirect, course.

Again, by the original Rule of first December 1790, all parties wishing to resume lands alienated, whether before or after 1st December 1790, must go to the Collector's Court and get a decree there. Whereas, by the Regulations of 1793, alienations *after* 1st December 1790 were *ipso facto* null and void; they were unauthorized alienations by the zemindar of the Govenment portion of the produce, as well as alienations of his own share, and were opposed to the Common Law of the country by which a portion of the produce of every beegah of land belonged to Government. As, moreover, the Government demand on estates had become fixed in perpetuity, it became of the greatest moment to prevent, as far as possible, the decrease of the security of the revenue; and hence the power which was given to the zemindars, enabling them at once, without recourse to the Courts, to dispossess the grantee and assess the rents after any lapse of time. The grantee, in short, was considered as a trespasser, who had and could have no rights in the eye of the law. It follows that Regulation XIX of 1793 placed the possessors of grants, subsequent to December 1790, in a very different position from that which they held before the passing of that Act.

It is very true, as stated by Baboo Dwarkanauth Mitter, that the Decennial Settlement did not commence on the 1st December 1790, and that therefore there must have been a time subsequent to the Settlement, when Section 10 Regulation XIX of 1793 did not apply, but the earlier Rule. Doubtless, from the 11th April 1790, or Bysack 1197, up to the 1st December 1790, about 8 months, the old Rules of 1790 were in force; and if any alienation of land within the Decennial Settlement estates then took place, they must be dealt with under the old Rules. But this point need not detain us now; it is one that has never arisen, and is never likely to arise. It is not alleged that the alienation of the present lands was anterior to the 1st December 1790, though subsequent to 1st April of that year; and the objection, therefore, has no real bearing on what we are now about to consider, *viz.*, the law which has existed since December 1790 up to the present time, regarding lands alienated subsequent to 1st December 1790.

Between the passing of Regulation XIX of 1793 and Regulation II of 1819, certain Regulations had been passed regarding the mode of procedure to be adopted in securing the just rights of Government over the lands, which, under Regulation XIX of 1793, Government was entitled to resume and assess; but they were found to be in several respects defective. They were, therefore, repealed, and Regulation II enacted, with a view (to use the words of the Preamble of that law) of establishing on proper principles one uniform course proceeding in resuming the revenue of lands *liable to assessment, so that the dues of Government might be secured without infringement of the just rights of individuals.*

Now, from these words, it seems clear that the main object of the law was the enactment of rules for the resumption of lands liable to assessment by Government under the Regulation of 1793, *i. e.*, lands of greater extent than 100 beegahs under one grant, held under invalid rent-free grant prior to 1790, but which had not yet been assessed. The first 29 Sections are mainly devoted to this object; and then comes the 30th Section, which enacts that all suits preferred in a Court of Judicature by proprietors, farmers, or talookdars, to the revenue of any land held free of assessment, as well as all suits so preferred by individuals claiming to hold lands exempt from revenue, shall, immediately on their institution, be referred for investigation to the Collector or other officer exercising the powers of Collector: provided also that proprietors, farmers, or talookdars, who may deem themselves entitled to the revenue of any land held

free of assessment in their respective estates or individuals claiming as aforesaid to hold land free of assesment, shall be at liberty to prefer their claims, in the first instance, to the Collector.

Now the question is to what lands do these words refer? Do they refer solely to lands held under Lakhiraj grants, which had been *expressly excluded* from assessment at the time of the Decennial Settlement the revenue of which had been assigned by Government to zemindars under Section 6, Regulation XIX of 1793; or do they refer not only to them, but also to lands *included* within the assessment of Government at this Decennial Settlement; but which subsequently had become exempt from paying the revenue due upon them in consequence of a grant from the zemindar in possession, or otherwise?

It appears to me not to admit of resonable doubt that this Section refers only to the former class of lands, and I arrive at this conclusion, *first*, from the wording of the Section when compared and contrasted with other Sections of other laws; and, *secondly*, from a consideration of the subject matter of Regulation II of 1819.

Now the Section, so far as suits of the zemindars are concerned, looks to lands held free of assessment, that is, lands on which the Government revenue had not been assessed. This was the position (speaking generally and with the possible exception noted above, *i. e.*, of lands alienated between April and December 1790) of lands alienated *before* 1st December 1790; but it was by no means the position of lands alienated by the zemindars *subsequent* to that date. They had, undoubtedly, been assessed at the time of the Decennial Settlement, and were only held exempt from the revenue which had been assessed upon them by the illegal act of the zemindars; an act which the Legislature considered so illegal as to render the grant itself resumable at the pleasure of the grantor, but without a reference to the ordinary Courts of Justice. Doubtless, this state of things is opposed to ordinary legal notions; for, as an estate is liable for its own arrears of revenue, and as on a sale, grants of this sort fall in, a zemindar might with safety be left intermediately to work, if he so pleased, his own ruin without any detriment to the estate. But such was not the opinion of the Legislature in 1793, which, in addition to requiring the security of the revenue, considered it necessary, by law, to protect the zemindars themselves and their heirs against their own improvidence and weakness—(Preamble to Regulation XLIV of 1793)—and such remains the Statute Law unto the present day.

A reference to the whole of Regulations IX of 1825, and III of 1828 will, with the exception of one or to places, confirm the view here taken as to the meaning of the words "lands free of assessment," *i. e.*, lands which have *never* been assessed by Government; whereas a reference to Section 10, Regulation XIX of 1793, and Section 8, Regulation IX of 1825, will show that the terms "exempt from the payment of revenue," *i. e.*, exempt from the payment of public revenue *that had been assessed* on it, is used regarding lands illegally alienated since 1790, which belong to the zemindar with whom the Permanent Settlement had been made in the first instance, though he is liable to pay the same to Government. It is not here asserted, however, that the words "exempt from the public revenue" are not used regarding lands *legally* exempted by Government from such payments, as well as regarding lands illegally exempted by zemindars from the revenue assessed on them. No doubt, they are both in Regulation XIX of 1793 and elsewhere; but only that the term *free of assessment* is hardly ever used regarding lands alienated by zemindars subsequently to 1790, and, consequently that Regulation II of 1819 does not apply to them. It is impossible, in interpreting the Regulations and Acts of Government, to predicate that the same terms universally bear the same meaning. The laws were not drawn up with technical accuracy. It follows that the same terms or junction of terms frequently import one thing in one place, and another in another; and a proposition establishing the general, not universal, use of a term, is all that can be laid down.

Turning from the words used to the subject matter of Regulation II of 1819, the point seems to me to be equally free from doubt. The first 29 Sections of the Regulation refer to the proceedings of Government officers on lands to which the right of resumption is with Government. The 30th Section enacts that Lakhiraj lands which Government originally had the right to resume, but which had been assigned by it to the zemindar under Section 6, Regulation XIX of 1793, should, to a certain extent, come under the cognizance of the Collector. The reason of the law was that the Legislature considered the Collectors more likely to be conversant with the documents upon which the validity or invalidity of grants of revenue depended, and with their proper

interpretation, than Civil officers. Hence it made either a reference of suits instituted in the Civil Courts to the Collectors necessary, or it enabled parties to bring a suit before the Collector in the first instance; but this ground did not apply to alienations after 1790. The issue in such a case was a mere question of fact which the Civil Courts had to determine, and there were no questions regarding the validity or invalidity of grants on which the supposed knowledge of the Collector could be brought to bear.

On these united grounds, therefore, I am clearly of opinion that Section 30 of Regulation II of 1819 does not refer to the case of lands alienated after 1790. But it is urged that the practice of the Court is the law of the Court, and that for a long series of years the Court has recognized cases of this nature as coming under Section 30 of Regulation II. of 1819; and consequently that even if there were any doubts upon the point, the Court should rather stand by the old practice than adopt a new rule, the adoption of which, moreover, will be attended with hardship and inconvenience.

If a long continued custom of the Court had distinctly recognized the doctrine contended for by the plaintiff, I should hesitate before I disturbed it, whatever my own opinion might be; the practice of the Court would, in such a case, be the law of the Court. No such continuous custom, however, seems to have existed. Up to 1859 zemindars and others suing to resume Lakhiraj lands, simply brought their action, mentioning their object, but indulging in no positive statement, save that the alleged Lakhiraj was invalid. The Court, under such circumstances, presumed that the suit was for the resumption of rent-free lands prior to 1790, and laid the burden of proof on the party claiming exemption from the public burden which had been assigned by Government to a private party; and in case the Lakhirajdar pleaded limitation against the zemindar, from abundant caution, the Court required him first to show that he held under a title which *primâ facie* the law acknowledged as a legal one giving him the right to plead the statute; but the question of the applicability of Section 30 of Regulation II of 1819 to lands alienated subsequent to 1790 was never raised directly on the pleadings, or decided after argument. After, however, the draft of Act XIV of 1859 appeared with the following words in Section 1, Clause 14, "Provided that, in estates permanently settled, no such suits, though brought within 12 years from the time when the title of the person first accrued, shall be maintained, if it is shewn that the land *has been held Lakhiraj or rent-free form the period of the Permanent Settlement*," the zemindars inserted in their plaints positive statements like that in the present suit, to the effect that the lands were mâl, or that the defendant had paid rents up to a certain period, when they or their ancestors had fraudulently, alleging it to be Lakhiraj, withheld the further payment of them. In the face of such positive allegations, it became the duty of the Courts to determine whether suits of this nature were cognizable under Section 30 of Regulation II of 1819, or under the ordinary law. There has been a conflict of decisions on the point, and the matter has been now argued before us for the first time; and, notwithstanding that the application of that law to cases like the present has sometimes been taken forg ranted, I haveno hesitation, for the reason given above, after paying every attention to the arguments pressed on the Court by the learned pleaders for the plaintiff, in determining on a consideration both of the wording of the Law referred to (Regulation II of 1819) and its subject matter, that that law is inapplicable to cases like the present in which zemindars sue to reclaim land not paying rent, on the allegation that it had been fraudulently alienated since 1790.

But then another question remains behind. Has the Collector, under Section 28 of Act X of 1859, exclusive jurisdiction in such cases, or has the Civil Court a concurrent jurisdiction with it in rent cases? Section 10, Regulation XIX of 1793, declares that all grants, of whatever extent, made after 1st December 1790, are null and void, and that no length of possession shall be hereafter considered to give validity to any such grant either with regard to the property in the soil or the rents of it. It, moreover, authorises and requires every persons then possessing, or who might hereafter succeed to, the proprietary rights in any estate, to collect the rents from such lands at the rate of the Pergunnah, and to dispossess the grantee of the proprietary right in the land, and to reannex it to the estate in which it might have been situated, without making, previous application to a Court of Judicature or sending previous or subsequent notice of the dispossession or annexation to any officer of Government. By Section 28 of Act X of 1859, the power given to zemindars and others, of acting without recourse to the Courts, is taken away; and proprietors, and farmers, who may desire *to*

assess or dispossess any such grantee, are required to make application to the Collector; and such application shall be dealt with as a suit under the provisions of that Act; and every suit is to be instituted within the period of 12 years from the time when the title of the person claiming the right to assess the land or dispossess the grantee first accrued; and if such period has already elapsed, or will elapse within two years from the date of the passing of that Act, the suit may be brought at any time within two years from such date.

Now it is clear that there is, in direct terms, no exclusion of the jurisdiction of the ordinary Civil Courts to which a person, if so minded, might have resorted, though he was authorized and required to act without the intervention of the Courts; and Courts are not to be ousted of their jurisdiction by implication. But it appears to me that there is in fact, by the force of the terms used, *an exclusion* of the jurisdiction of the ordinary Courts.

This Section, after repealing a portion of Section 10, then enacts that any proprietor who may desire to assess any such land, or to dispossess the grantee, shall make application to the Collector, and such application shall be dealt with as a suit under the provisions of this Act—dealt with, that is, as any suit, either for assessment or ejectment, under Section 23. Now all such suits are cognizable, in the first instance, by the Revenue Courts alone; it follows that these suits which are to be dealt with as such under Section 23, fall equally within the same rules, and are cognizable only by the Court of the Collectors.

But admitting, for argument's sake, that the terms of the law are insufficient to bar the jurisdiction of the Civil Courts, and also that a subsequent law does not abrogate a previous law on the same subject, in the absence of express terms, unless the *provisions* of the one are manifestly repugnant to those of the other, it appears to me that such a repugnancy exists in the present instance.

The express remedy under the old law was either by the taking possession of the land illegally granted on the part of the zemindar without recourse to the Courts, and by the collection by him of the rents forth with, at any time, or by a suit for possession *at any time*; for, it is declared that no length of possession gave validity to such grants, *i. e.*, so as either to establish a right of the grantee, or to bar the remedy of the grantor; and this declaration is unaffected by Act XIV of 1859, which, in Clause 14 of Section 1, refers not to lands of this nature which are never in the laws styled Lakhiraj lands, but to those which are really such throughout the British territories in India to which the Act. applies. By the new law, within twelve years from the time, when the title of the zemindar first accrued, or if that had elapsed within two years from the date of the passing of Act X of 1859, a suit either for assessment, *i. e.*, after notice served, or if notice has not been served, for declaration of his right to assess or for dispossession, must be instituted by the zemindar. In short by the old law of 1793, the granteee was regarded as a trespasser; by the late law, he is regarded as a tenant, liable to ejectment or assessment. By the former, he could be ousted at any time; by the latter, he is protected by a strict law of limitation applied, it may be, by reason of a supposed analogy between these cases and those referred to in Clause 14 of Section 1, Act XIV of 1859.

Looking, then, to the substantial difference of the remedy, and the period within which it might be sought, the two laws seem to me incompatible with each other, and incapable of standing together; and the conclusion therefore is, that the former law is repealed, and that the Legislature, in withdrawing from zemindars the large powers which the law of 1793 gave them, and enacting a new and specific remedy in special Courts, intended that those Courts should have exclusive jurisdiction in such matters.

On the above grounds, therefore, it seems to me that the Revenue Courts have alone jurisdiction in such cases at the present day, and the jurisdiction of the Civil Courts has been taken away by the enactment of Section 28 of Act X of 1859.

For the reasons given above, I am of opinion, on the points submitted for our consideration, *first*, that Section 30 of Regulation II of 1819 does not apply to a case like the present; and *secondly*, by the enactment of Section 28 of Act X of 1859, all other remedies in such cases were taken away and exclusive jurisdiction in such cases vested in the Revenue Courts.

Mr. Justice Glover.—I entirely concur in the opinion expressed by Mr. Justice Trevor.

Mr. Justice Shumboonath Pundit—In this suit the point submitted for the consideration of the full bench is, whether, after the passing of Act X of 1859, suits for possession or assessment of rent-free *grants* made subsequent to 1st December 1790, out of the lands of a permanently settled estate in Bengal can or can-

not, with reference to Section 28 of the aforesaid Act, be brought by the zemindar in the Civil Court.

By Section 10, Regulation XIX of 1798, all rent-free grants made subsequent to 1790, without the sanction of the Governor General, were declared null and void; and the zemindars from whose estates such alienations may have been made, were authorized to take possession of such alienated lands *at any time* and *without recourse to any Court of Justice.*

By Section 17 of Regulation XIX of 1793, out of Lakhiraj grants subsequent to 1765, but before the 1st of December 1790, the lands comprising which grants were not included in the Decennial Settlement of the estates within which they were situated, the revenues of all grants in each case, whether in one or more villages, for less than 100 beegahs, are liable to resumption, were made over to the zemindars of the estates within which the lands were situated; and by Section 9 of the said law, provision was made for assessing these lands through the Collector.

Before, however, assessing these lands, the zemindars of Government itself, in cases of invalid rent-free grants of above 100 beegahs (from 1765 to 1790), were required to sue in the Civil Courts (*see* Sections 11 and 12 of Regulation XIX of 1793) in order to render these lands liable to assessment. This was called *resumption* of the lands. The power of the Civil Courts, however, ended with that adjudication.—(*See* Construction No. 576, dated 1st October, 1830.)

As Government had dispossessed many Lakhirajdars before these rules were passed, and zemindars were also, with regard to rent-free grants assigned to them, likely now and then to take the law into their own hands, parties dispossessed or likely to be dispossessed from Lakhiraj lands, but claiming to hold them rent-free, were empowered to sue in the Civil Courts against Government and others for recovery of possession, or for establishing their right to exemption from resumption. For lands which had been settled at the Decennial Settlement with the zemindars, and which might afterwards be found to be held rent-free subsequently to 1st December 1790, the zemindars had, by Section 10 of Regulation XIX of 1793, full powers to *dispossess.*

As to grants subsequent to 1790 in estates decennially settled, *sanctioned by the Government*, the Lakhirajdar, if he thought himself aggrieved by being unlawfully ousted by any person claiming the rents of these lands, had also a right to go to the Civil Court for redress under the general powers of the Civil Courts, but not under the special provisions made by Regulation XIX of 1793 in favour of Lakhirajdar claiming to hold rent-free from a time previous to 1st December 1790. Any Lakhirajdar claiming to hold under a title acquired previous to 1790, though dispossessed by any person claiming the rents of the lands, under an allegation of the same being parts of the estate settled with him, could go to the Civil Court under the said special provisions.

By Sections 22, 23, 24, and 25 of Regulation XIX of 1793, the holders of all rent-free lands, previous to 1st December 1790, were required to register their grants in the Collectorate; but no provision whatever was made for registering any grants subsequent to 1790, even when they were sanctioned by the Governor General. From time to time modifications were made of the existing rules for the resumption, on behalf of Government, of rent-free lands, existing previous to 1790, of more than 100 beegahs, until in 1819, Regulation II of that year was passed by way of a modified procedure for the assessment of these rent-free grants (previous to 1790), as well as for assessing for the benefit of Government other lands not included within the settlement of any estate.

By Section 30 of the same law, new rules were passed for the assessment, by private parties, of rent-free grants, before 1790, of less than 100 beegahs, assigned over to them and for the resumption suits on behalf of Government as zemindars; and also for suits against Government by parties dispossessed by Government of their Lakhiraj lands. By Regulation II of 1819, in cases of Government suing as the Sovereign, the Collectors become authorized to try, under the sanction of the Board of Revenue, resumption suits; and the parties against whom a decision for resumption may be pronounced, were allowed (Section 24) to sue within a year from the sanction of the Board, in order to contest the propriety of the award of resumption. By Section 30 of the same law, parties dispossessed by Government (except in cases provided for in Section 22, in which suits complainants had not to pay the usual institution stamp duty for plaints), and the Government as zemindars, and the private zemindars wishing to resume rent-free grants previous to 1790, of less than 100 beegahs, as well as parties wishing to contest such demands of the Government or of the zemindars, were

all required to sue eitheir in the Collectorate or in the Civil Courts; but, if in the latter, the suit was immediately to be made over for report to the Collector.

Now, the Collector had with him the register of the rent-free lands previous to 1790, and other means of knowing what was the state and condition, as well as the proper history of all rent-free grants previous to 1790; but there was no data in his Office to report upon or investigate anything regarding any lands held rent-free since 1st December 1790, and which had been already settled as a part of an estate.

The title, the preface, the whole subject, and the wording of the contents of Regulation II of 1819, as well as the laws it modified, the requirements and scope of its Section 30, shew that the Section was not at all intended to include any case under Section 10 of Regulation XIX of 1793.

By this latter Section, the law had given power to zemindars to take possession of lands held rent-free from a time subsequent to 1st December 1790; and the law-makers had no legal necessity or occasion whatsoever to *notice* that, if these landlords may deem it proper and expedient to have recourse to Civil Courts to obtain possession, they might do so. Much less was it necessary for the Legislature to provide or make rules of procedure for cases of *assessment* of these lands to be brought by the landlords when they may think it convenient to sue for the lesser right of merely receiving rents from the Lakhirajdar in possession.

For both these objects the landlord could go to the Civil Courts under the general powers of these tribunals; and, until Section 28 of Act X of 1859 was passed, it was never thought proper by the Legislature to allude to this undisputed power of a landlord to abandon a part of his claim, and to be satisfied with asking for only a portion of what was allowed to him by Section 10 of Regulation XIX of 1793. The law could only make rules for cases of trespassers, but not for a case of a trespasser whom the landlord may choose to treat as a tenant.

The law could not provide rules for anything less than the power it had given, *viz*, that of *ousting* the Lakhirajdar; and so no provision was made for any other limited mode of exercising that power which the landlord may find it expedient to adopt.

When, with reference to Lakhiraj grants created subsequent to 1790, in estates not yet settled, it was thought proper, in modification of Section 30 of Regulation II of 1819, by Regulation IX of 1825, to authorize the Settlement Officers to decide the questions of the validity or invalidity of the Lakhiraj tenures without any reference to the Board, as well as of fixing the amount of assessment in all cases, whether the same belonged to the Government as revenue or as rents to private parties, precaution was taken by Section 8 of the law to declare distinctly that no portion of Regulation II of 1819 affects the powers given to the landlords by Section 10 of Regulation XIX of 1793. The words of Section 30, however general, cannot be extended to suits inconsistent with the general scope of the law and of the procedure of the Section itself.

It appears that, immediately after the passing of Section 30 of Regulation II of 1819, the purport of the Section was now and then misunderstood, and accordingly steps were adopted by the Legislature, and the Courts to remove these doubts.

It is, however, quite clear that, with regard to rent-free lands which the zemindar knew were creations subsequent to 1st December 1790, and for which rents had been withheld after that period, but regarding which the Lakhirajdar falsely asserted that he was holding under some grant previous to 1790, if the zemindar chose to sue under Section 30 without disclosing his own case and his knowledge regarding the origin of the tenure, the defendant could not dispute the adoption of the procedure of this Section or the form of the action, as it was one consistent with, and adapted to, his defence. Such cases of Lakhiraj created after 1793, might, at first, without any opposition, have gone under Section 30 of Regulation II of 1819 to the Collector from the Civil Courts for report, and then similar cases may have been instituted in the Collectorate, and then by degrees cases for resumption may have been allowed to be instituted first in the Civil Courts, then treated as under Section 30, and then at once primarily instituted in the Collectorate, even when the plaintiff may have distinctly disclosed in the plaint that rents have been withheld from a period *subsequent to* 1790.

It is, however, clear that many decisions of the Civil Courts sometimes confirmed and increased the then existing misconstruction of the purport of this Section 30 Regulation II of 1819.

It appears that, by Construction No. 527, dated 30th October 1829, the late Sudder Court ruled that "suits of every description in which Lakhiraj lands are in dispute, and

properly cognizable by the Collector, and not those only in which Government is a party." The wording was general enough to enclude even cases for Lakhiraj lands in which the question of validity or invalidity of the tenure was not in any way disputed. That this was the extent to which the wording was likely to be understood, is apparent from the next Construction No. 981, passed, on this subject, on the 16th of September 1835, by which the late Sudder Court ruled "that in all cases in which the right of ownership is alone the point at issue (as for instance when the heirs of a holder of rent-free lands sue their coparceners for their respective shares), the case appertains solely to the Civil Court; on the other hand, if the nature of the tenure, as well as the proprietary right is disputed, *viz.*, if a zemindar claims *possession* of any land attached to his estate, and the defendant pleads that he holds possession thereof as rent-free or *vice versâ*, the case must, in the judgment of the Civil Court, be referred to the Collector for report." Now the wording of this Construction, as well as of the former, distinctly shews that both of these included even cases for *possession*. It is, however, a matter of doubt whether the possession mentioned in the latter Construction was possession under Section 10 of Regulation XIX of 1793. If it be allowed that cases for possession of lands created Lakhiraj since 1st December 1790 were, but wrongly by both the Constructions, or at least by the first one, required to be referred to the Collector, it might be equally urged that, if cases for assessment of rent-free grants after 1st December 1790 were under these rulings adjudicated upon under Section 30, the jurisdiction was wrongly assumed. That this mistake regarding cases for *possession*, was not redressed until later years, will appear from the following decisions of the late Sudder Court. The first one is dated 21st January 1851, page 35. Apparently, this case was for possession of lands held rent-free since 1790, and was ultimately decided on the 15th July 1852 by a bench of five Judges, the majority of whom held that the procedure of Regulation II of 1819 applied to the case—(*See* pages 686 to 689). Another is dated the above date, and reported in pages 690 to 696. A third, dated 26th August 1852, reported in pages 868 to 870; and lastly, the case decided on the 28th April 1853, reported in pages 430 to 432, and originally remanded on the 20th May 1847 (page 163). It is admitted that it cannot be inferred from these decisions that cases for the assessment of rent-free tenures subsequent to 1st December 1790 are unconnected with Section 30 of Regulation II of 1819. It is equally clear that neither the Judges nor the parties raised any question on the point; and it was assumed by several of of the Judges trying these cases, that cases for assessment of all Lakhiraj lands were intended to be guided by this Section.

The Court had, however, by a previous Construction, No. 1067, dated 30th December 1836, decided that "a suit brought by a zemindar *for the* rents of lands in which the defendant claims the right of property in virtue of a rent-free grant, is not referable to the Collector under the provisions of Section 30 of Regulation II of 1819." There are several decisions to be found in the printed reports of the late Sudder Court from 1850 to 1854, in which several Judges have decided in conformity with this construction; but from many of the decisions it is also understood, that, according to the Judges, the Lakhirajdar might still go under Section 30 for contesting the liability of his lands to pay any assessment. This shews that the law on the subject was at least uniformly, if not correctly, construed by the several presiding Judges.

The usual mode, however, of the landlord setting at issue the question of the invalidity of Lakhiraj tenures subsequent to 1790, was to serve a notice upon the tenant; and on the landlord suing for the rents so demanded to be assessed, the defendant pleaded a Lakhiraj title previous to 1790; the landlord denied this fact, and the Civil Court tried the suit without any reference to the Collector. The Courts did not confound these cases with cases for resumption of Lakhiraj lands assigned to zemindars under Section 6 of Regulation XIX of 1793, for which Section 30 of Regulation II of 1819 was passed and decided upon the plea of Lakhiraj; and if it was not made good, *fixed* the proper rents. For grants declared to be null, there was no legal necessity to sue to have them pronounced null. The rents which could not be fixed under Section 30 of Regulation II of 1819, even in cases of grants previous to 1790, were asked to be fixed; and if the defendant pleaded a title to exemption, his defence was heard and tried; and if the lands were found to be held under grants of a date previous to 1790, the claim of the plaintiff was non-suited and he was referred to proceed under Section 30 of Regulation II of 1819. The notice served was under Sec-

tions 9 and 10 of Regulation V of 1812, which related to cases of enhancement. In this case, sometimes the landlord distinctly admitted that he or his predecessor had not received rents before or for some time, or pleaded by way of fiction of law that the defendant paid *inadequate rents*. When it so happened that the defendant admitted himself to be a tenant of some lands and pleaded a Lakhiraj title for the rest, the assertion of the landlord was not altogether false. Even in these cases, from the fact of the claim being one virtually to try the validity of the Lakhiraj title set up by the defendant, it is not improbable that the Courts never took any notice of the false plea of *inadequate* rents being paid before, and at once threw the onus upon the Lakhirajdar to prove his title to exemption. There are, however, several decisions shewing that in these cases the onus of proof was rightly thrown upon the plaintiff (*See* 29th March 1853, page 365).

Sometimes, however, in such cases when it was found that, regarding the land asked to be assessed, the defendants pleaded that they were wholly or partly Lakhiraj, alleged to be prior to 1st December 1790, the Courts refused to adjudicate upon the right to assess, though the allegation of the plaintiff was that they were rent-free creations subsequent to 1st December 1790. This, I fear, was a mistake of law, as the allegation of the plaintiff, and not the defence, is to settle the jurisdiction of a Court.

In cases where the plaintiff asserted that the rent-free lands, were lands affected by Section 10 Regulation XIX of 1793, he was as much entitled to an adjudication upon his right as when he is opposed by the defendant on the plea that he holds under a lease *fixing* the rents in *perpetuity*, and the plaintiff denies the validity and also the genuineness of the title so set up. In cases, however, when the Lakhiraj title pleaded by the defendant for the lands in his possession which the landlord wants to assess, are lands the rents of which have been withheld since 1st December 1790, or, in other words, are the Mâl lands settled with the plaintiff, the Courts could not but refuse to try the question of the validity of the tenure pleaded in the assessment case, merely because a particular form and procedure quite distinct from those adopted for assessment cases was provided for these cases of "resumption." With regard to lands claimed to be assessed on the ground of rights given by Section 10 of Regulation XIX of 1793, there could not be any such plea.

I cannot distinctly state what was the allegation of the plaintiff in the case No. 2088 of 1862, decided by the Chief Justice and myself on the 14th June 1863 (reported at page 554 of Marshall's Select Reports). If the assertion of the plaintiff regarding the Lakhiraj pleaded by the defendant was that it was a creation of a date subsequent to 1st December 1790, the order of the case was opposed to my present view of the matter. That the Chief Justice is not of opinion that no suit could be brought at once to assess lands governed by Section 10 of Regulation XIX of 1793, will appear clearly from the subjoined extract from another decision passed by him in conjunction with four other Judges on the 1st June 1863. It is reported in pages 523 to 527 of the said number of the aforesaid report :—

"In this case the Court had no power to try the validity of the Lakhiraj tenure. To entitle the plaintiff to recover enhanced rent for that portion of the land, he ought to have shewn that it was his Mâl land, and that the defendant had paid rent for it; but no evidence of the kind appears to have been given."

In some cases, the form adopted for possession of what was really intended to be understood as invalid Lakhiraj created after 1790, was simply to claim possession on the assertion that the landlord had been dispossessed by the defendant, who in defence pleaded that he has all along held the lands in dispute as Lakhiraj (*See* 10th November 1857, pp. 602 and 603). Such cases were not referred to the Collector under Section 30 of Regulation II of 1819.

In all these cases for assessment, as well as for possession, under Section 10, no limitation was applied. On the 10th September 1855, the late Sudder Court, in the case of Gunga Dhur Bannerjee, decided that, to resume, a landlord must sue within 12 years of his acquiring the right to do so. Grants subsequent to 1790, by the decision in the case of Degumber Mitter, dated 24th July 1856, page 617, and by many others of subsequent date, were expressly excluded from the operation of this ruling regarding limitation.

As there was before no such competition for lands as there is now-a-days, in all cases of invalid Lakhiraj falling under Section 10, Regulation XIX of 1793, the zemindars found it more convenient to sue for assessment than for *dispossession*.

When the precedent mentioned above applied limitation to suits for resumption of Lakhiraj grants before 1790, in order to avoid limitation, it became a rule to sue under the allegation that the Lakhiraj asked to be assessed was subsequent to 1790, and formed a portion of the Mâl lands. This was meant to describe rent-paying lands, as distinguished from those which had not been included in the settlement on account of their being held exempt from revenue: and so of rent, under either valid or invalid grants existing on the 1st December 1790. The landlords adhered to Section 30, because they knew that, in cases under it, the onus is thrown entirely upon the defendants; and thus after 1855, Section 30 was stuck to for more than one purpose in all cases of assessment of Lakhiraj lands.

A case reported in Vol. 4 of the Select Reports in p. 155, instituted shortly after the passing of Regulation II of 1819, and decided on the 6th February 1827, might lead to the inference that the Sudder Judges deciding the case intended to rule that cases for possession of lands converted into Lakhiraj subsequently to 1790 were not at all anywise to come under the laws passed for resumption suits.

By Section 14 of Regulation I of 1814, the valuation for property exempt from the public revenue due to Government, as distinguished from Mâl lands, was required to be eighteen times the yearly rents; and when Section 30 of Regulation II of 1819 provided that the valuation stamp fees of the cases under that Section were to be as those of cases instituted in Civil Courts, the parties suing under Section 30 adopted this mode of valuation. In Schedule B of Regulation X of 1829, under the note to Article No. 8, the same provision is described in these words, —"In suits for *Lákhiraj lands not paying revenue* to Government, the value shall be assumed at eighteen times the amount of annual rent by competition."

The Lakhirajdar suing for possession could not but adopt this (*See* 29th December 1853, p. 982); but the landlord suing to assess the lands held rent-free, having no other valuation to adopt, could not but adopt this of eighteen times the yearly rents of the property.

When, however, landlords sued for assessment by serving notice without first bringing any case to prove the liability to assessment, they, as ruled by Construction 1272, dated 31st January 1840, paid stamp fees on the valuation of only one year's assessed rent. In cases of enhancement, landlords had to pay the stamp fees on the valuation of one year's enhanced rent.

The eighteen times the annual produce was the representation of the value at those times, and is in fact rather below the market price of those rent-free lands.

It is argued that when by Act XIV of 1859, which came into operation in the beginning of 1862, the right to *sue for assessment* of Lakhiraj tenures before 1790, was declared barred even to auction purchasers, if Section 30 of Regulation II of 1819 was not applicable to the assessment of Lakhiraj tenures subsequent to 1790, how was it provided in Section 10, Act VII of the Bengal Legislative Council for the year 1862, passed in modification of that Section in May 1862, that all cases in future under the said Section (30) were to be instituted in Civil Courts like other ordinary suits? It is, however, apparent that the laws passed of late are open to the remarks against the laws of 1793 made by the learned Counsel, Mr. Montriou, while advocating the cause of the landholders in the famous case of Gungadhur Banerjee. He said that they were written as if, at the time of writing, the attention was only confined to that law without any reference to its effect upon other laws or of others upon the said law (*See* page 510 for 1855).

Owing to the right of suit, with regard to the exercise of the powers of resumption or assessment to those who were not auction purchasers within twelve years of 1862, having been confined at the best to the end of 1861, in the latter portion of the year a vast quantity of suits were instituted throughout several of the Bengal Districts, chiefly in Hooghly and Burdwan. These cases were all instituted under Section 30 of Regulation II of 1819, either in the Collectorate, or, after being instituted in the Civil Courts, had been or were to be made over to the Collectors. The Revenue Courts throughout Bengal had already been made exclusive Courts for all cases mentioned in Sections 23 and 24, Act X of 1859; and provision was also made by the same Act for reference to the Collector of many other complaints upon different questions arising between landlords and tenants. The Collectors had thus their files already overwhelmed with these cases. The fact of the last few months of 1863, being too late for cases of arrears of rent due more than three years before the passing of the Act, it was apparent that towards the end

of the year many more cases were likely to be instituted in these Courts which could not be instituted anywhere.

Besides, in some districts, the indigo disputes had brought in the Revenue Courts an enormous quantity of suits for assessment and enhancement, and "the right of occupancy" had given rise to many suits. In order to decide these cases, in several districts many extra hands had been engaged. The resumption cases already instituted could not be disposed in any district for several years, if they had to pass through the Collectorate so burdened with different sorts of cases.

To relieve the Revenue Courts from these arrears, and to see these cases under Section 30 speedily decided, was the real object of passing this law of 1862, by which the pending cases were to be transferred to the Civil Courts, as was done by Section 2 of the Act. Besides, it was considered that Lakhirajdars dispossessed by landholders before Act X of 1859 was passed, or even afterwards, might have occasion to sue for recovery of possession; and for these persons the original remedy provided for by Section 30, Regulation II of 1819, was still considered as the law under which they might be allowed to sue. The latter portion of Clause 14 of Section 1 of Act XIV of 1859 being applicable only to estates permanently assessed in Bengal, there might still be lands held Khas, but not at all settled, in which there may be lands held rent-free under grants alleged to be before 1st December 1790, and to the revenue of which lands Government still have a right. The law of 1859 was also merely a rule of limitation; it could not prevent cases being brought by parties. Under this state of things, probably, the Legislative Council of Bengal thought it proper to word Section 1 of Act VII of 1862 as it is now worded, meaning that the provisions of that Section will be, in the case of private claims by landlords, applicable, with reference to the laws enacted before by the Legislature, only to cases to which it will actually apply, *i. e.*, to suits by those who may still have a right to sue for assessment of rent-free grants before 1790.

Section 1 of Act VII of 1862 of the Bengal Council is not, therefore, any conclusive proof of the law-makers having understood that Section 30 of Regulation II of 1819 was actually applicable to suits for assessment of rent-free holdings subsequent to 1st December 1790.

Even, if mislead by the loose practice of the Courts, the framers of that Act of 1862 had thought so, that would not extend the operation of the law of 1819. It is, therefore, clear that, either in cases for possession or in cases for assessment of rent-free grants subsequent to 1790, before Section 28, Act X of 1859 was passed, the ordinary Civil Courts were the tribunals where the suits would have been instituted.

It appears that, when Section 28 was originally proposed, it simply was intended to be applicable to cases of *possession* and not of assessment; and the non-limitation clause of Section 10 Regulation XIX of 1793 was left unaffected. When it was found that a provision of limitation had been introduced in Act XIV of 1859 (passed only five days after Act X, and considered simultaneously with the latter) on this subject of assessment inferentially for Lakhiraj lands subsequent to 1790—a class of cases, which, the Legislature found, were often instituted, though not provided for in express words by any law passed before—the cases of assessment were also included in Section 28; and the same rule of limitation that was made applicable to assessment suits under Clause 14 of Section 1 of Act XIV of 1859, and which had been provided for all cases of possession under Clause 12 of the same Section, was made applicable to those of possession and assessment mentioned in the said Section 28. If Clause 14 of Section 1, Act XIV of 1859, had been held to be intended to be the general code of limitation for *all cases in all Courts*, there might be some ground to argue that, by Section 28, exclusive jurisdiction was intended to be given to the Collector in cases mentioned in that Section. It has already been held that Act XIV does not override the limitations mentioned in Act X of 1859. It is also clear that the original framers of Act X may have intended to give that meaning to Section 28; but the rules passed in other laws may be the reason for the omission of those words in this Section, which, we find, are given in Sections 23 and 24, to the effect that the cases provided for in these Sections were *not* to be heard *in any other Courts*. The intention at the time of framing of any Section of a law, whether changed or not changed by those who ultimately pass the law, will not by itself be a good ground for a Court of Justice to construe the meaning of the law in conformity with this intention, when the wording of the law *as passed*, compared with others passed before or at the same time, distinctly leads to a construction opposed to that intention. If

the new remedy provided by the new law is not at all inconsistent with the old remedy and when the old remedy, as now modified, is found to agree exactly with the new remedy now under consideration, there is no reasonable ground to infer that the jurisdiction of the Collector is entirely exclusive. The power to *assess* is not anywise inconsistent with the power to *oust;* the latter included the former; and the imposition of a rule of limitation in the Collectorate, even though no such rule was made for suits to be brought in Civil Courts, would not have made the new remedy any way consistent with the old mode of redress. In this view of the case, I think that a case for assessment or possession of Lakhiraj lands subsequent to 1st December 1790 can be brought either before the Collector, under Section 28 of Act X of 1859, or in the Civil Courts under the ordinary powers possessed by these Courts, irrespective of Section 30, Regulation II of 1819.

All the arguments used by Mr. Justice Raikes and Mr. Justice Trevor, in the case reported in pages 26 to 29 of the decisions for 1861, decided on the 7th November of that year, to prove that suits under Section 28 were only petitions in matters appealable to the Revenue Commissioners and not to the Judge, apply to the point now under discussion, and shew that the jurisdiction of the Collector under Section 28 is not exclusive. The fact that this decision on the point it ruled has since been set aside by another full bench decision of five Judges passed on the 18th March 1863, reported in page 441, does not at all affect the argument. The subsequent ruling simply decided that, as the matter brought before the Collector under Section 28 is required to be *tried* and dealt with as a suit, the appeal should be to the *Judge.* Whether, after such a decison, another case on the same grounds which formed the subject matter of dispute before the Collector, can, by the party dissatisfied, be again brought or cannot be brought at all, before the Civil Court, is quite a different question. The word *shall* in Section 28 only points to the necessity of suing, which landlords were not required to do before, previous to the ousting of persons holding rent-free grants subsequent to 1st December 1790, and cannot in any way enable us to get rid of a separate provision for limitation of such cases expressly provided for cases of assessment in Clause 14 of Section 1 of Act XIV of 1859. The argument of there being a limitation fixed in Section 28, particularly two years' time being given for cases in which this limitation had already expired, is of no consequence, as it is clear that there might be some limitation for these cases even when the Court of the Collector is the exclusive Court. Only within some fixed time a suit for current arrears could be brought in the Collectorate, and the jurisdiction of the Civil Courts or the limitation applicable to these cases in the Civil Courts was in no way affected by this additional new remedy of a summary case. There being temptation to go to the Collector as only ¼ of the stamp duty was required, nobody chose to go to the Civil Court; but the law did not prohibit landholders from going to the Civil Courts for their current arrears. Hence, there being a dread of *onus* in these cases of resumption of rent-free grants after 1790, though no stamp fees are required under Section 28, the zemindars do not like to go to the Collectorate as long as they have a hope that they may still sue in the Civil Courts under Section 30 of Regulation II of 1819, which throws the *onus* upon the defendant. If they knew that the Civil Courts have jurisdiction, but not under Section 30 of Regulation II of 1819, the zemindars will necessarily prefer to come under Section 28 of Act X of 1859.

As to the suggestion made, that the original Section 10 of Regulation XIX of 1793, as well as the present Section 28 of Act X of 1859, now under consideration, refer to *grants* and not at all to cases of lands for which rents may have been *only withheld* subsequent of 1790 without the ryots having any grant, it is clear that, in all cases ordinarily instituted for assessment of rent-free lands alleged to be created after 1790, no person has found it convenient to plead any invalid grant subsequent to that year except any grant given by the complainant himself or his predecessor; while, generally, these cases have been defended by the Lakhirajdars under *an allegation* of rent-free grants previous to 1790.

The holding of a rent-free grant previous to 1790, or even after, is an adverse title which the landlord is obliged to set aside before he can succeed in assessing or obtaining possession of the lands. When the landlord sues in the Civil Courts for possession or assessment; the defendant pleads a rent-free grant and puts in a copy of a Taidad relating to the village in question. In such a case the plaintiff must prove that the lands of which he asks possession or assessment are parts of his estate which he held, or from

which he received rents within twelve years preceding the suit, without the defendant being put to the proof of his alleged grant. Accordingly, in cases of lands held rent-free without any grant from a period subsequent to 1790, the claim of the plaintiff will be liable to limitation under the ordinary law, without any reference to the provision of the Act of 1859. As most of the cases to which the present discussion applies are cases without any grant subsequent to 1790, and the right of the landlord to sue for the assessment of these lands in Civil Courts is not at all denied, and all these cases have now, if instituted in the Collectorate, been transferred to the Civil Courts, it is immaterial, with regard to these cases, whether there is any grant at all of a date subsequent to 1790. The fact of a grant or no grant, if considered material, will be so only in cases instituted under Section 28 of Act X of 1859. In this view of the matter, even if the jurisdiction of the Collector is exclusive in all cases mentioned in the said Section 28, it must be so only in cases where there is any question of a *grant* of a date subsequent to 1790, and the Collectors cannot have any jurisdiction in cases where no such question does arise. I have only seen one case of a grant subsequent to 1790 affirmed by a Governor General. It is reported in page 240, Vol. 2, S. A. Reports.

The wording of Clause 14 of Section 1 of Act XIV of 1859, does not confine the cases mentioned in that Section to grants, but provides for assessment of rent-free lands of course subsequent to 1790. I may, therefore, have no hesitation in agreeing with my colleagues who hold that the remedy in Section 28 of Act X of 1859 is confined to cases of grants subsequent to 1790. But I am not prepared to hold that that jurisdiction is exclusive, or that the Collectorate is the only Court where all actions for possession or assessment of lands, the rents of whichare alleged by landlords to have been withheld since 1st December 1790 under any rent-free grant or without any such grant at all, can now be instituted.

The case now before us, is, in my opinion, cognizable in the ordinary Civil Courts without any reference to Section 30 of Regulation II of 1819, under the general powers which the Civil Courts possess, irrespective of that Section which does not apply to cases mentioned in Section 28 of Act X of 1859.

I would therefore allow the case to proceed.

Mr. Justice Phear.—This case, which has been argued before us at great length and with elaborate care, relates solely to pure matter of procedure. The suit is brought substantially to obtain a declaration that the plaintiff is entitled to the rent of certain land which he alleges that the defendant holds within his zemindarry on an invalid rent-free title. It was in the first instance preferred before the Principal Sudder Ameen, and now comes to this Court by special appeal on several grounds; but it is agreed by both sides that the only question to be determined by us is, whether or not the Civil Courts, as distinguished from the Collector's Courts, have jurisdiction to receive and deal with the suit; and this question turns upon the construction to be given, *first*, to a Section of a Regulation made in 1819; and, *secondly*, to a Section of an enactment made in 1859. Unfortunately our forensic procedure is based so little upon any general *a priori* considerations, that it is nearly possible to infer the motives actuating the Legislature from the forms which it is found ultimately to prescribe. Still, in the absence of any specific declarations on the point, I conceive that the Legislature must be always presumed to have intended to facilitate the recourse of suitors to the legal tribunals rather than the contrary. This presumption affords us but little assistance here; but, such as it is, it is the only guide we have extraneous the actual words of the enactments where these leave us in any doubt or obscurity.

The two enactments to be construed are the 30th Section of Regulation II of 1819, and the 28th Section of Act X of 1859. But before considering them, it is necessary to call to mind the state of thing, relative to proprietary rights in the soil or its produce which was brought about by the Permanent Settlement of 1793. This Settlement was founded on the principle that "by the ancient law of the "country the ruling power is entitled to "a certain proportion of the produce of "every beegah of land (demandable in "money or kind according to local custom) "unless it transfers its rights thereto for a "term or in perpetuity, or limits the public "demand upon the whole of the lands belong-"ing to an individual, leaving him to appro-"priate to his own use the difference between "the value of such portion of the produce "and the sum payable to the public whilst he "continues to discharge the latter." Practically, the ruling power nearly always transferred its rights or limited its demand in the way thus mentioned; and the lands from which the dues

would have accured, had they been paid in kind, were termed in English the estates of the transferees or other owners respectively. Clearly, the proprietors of such so-called estates had no power to grant away any portion of their land free of liability to pay the public dues, and so to diminish the amount receivable by Government from themselves or their successors. Still, such pretended grants had been, and continued to be, made, and Government itself sometimes made valid grants of the like kind. So that, when the Permanent Settlement confirmed the proprietors in their estates upon condition of their paying by way of revenue a certain fixed jumma or rent in perpetuity, this jumma was assessed on each estate, exclusively and independently of those portions of it as were *at the time of the assessment* claimed to be held Lakhiraj or free of revenue, by virtue of any such grants.

By Regulation XIX of 1793, Section 3, made after the Permanent Settlement, "*All grants* "*for holding land exempt from the payment of* "*revenue* which may have been made *since* "12*th August* 1765, and *previous to the* 1*st* "*December* 1790 by any other authority than "that of Government, and which may not have "been confirmed by Government or by any "officer empowered to confirm them, are de- "clared invalid," and the revenue withheld under pretence of any invalid grant made previous to the 1st December 1790 is allotted between the proprietor of the estate and the Government in the following manner. Section 6 says, that, if the land which is the subject of any one such grant does not exceed one hundred beegahs, the revenue assessable thereon shall *belong* to the proprietor of the *estate* in which such land is situated, who shall not in consequence be liable to pay any additional revenue in respect of his estate. And by Section 7 if the land in one such grant exceed one hundred beegahs, the revenue assessable thereon shall belong to the Government. Before the proprietor of the estate can claim the revenue given him by Section 6, he must establish the invalidity of the grant before the ordinary Civil tribunals (Section 2); thereupon he becomes entitled to recover such an amount in perpetuity as the Collector on due investigation may fix (Section 9). Under no circumstances does he obtain a right to obtain *possession* of the soil, (Section 6).

The subject matter of grants made *after* 1*st December* 1790 was dealt with by the Legislature somewhat differently. It is as well to observe that the Permanent Settlement was not definitely established until after this date; and the assessment of the fixed jumma on particular estates might be, and was in plenty of instances, delayed to a considerably later period. Hence, so far as concerns such of these grants subsequent to the 1st December 1790 as were made before the assessment of the jumma on the estates within the geographical limits of which they purport to take effect, these operate to deprive the Government of revenue, while those of them which were made after that assessment only go to diminish the proprietor's (zemindar, talookdar, and so on, as the case might be) sources of income from his estates. I shall have occasion to refer to this distinction further on; but it is, at the outset, important to remark that this distinction was, at any rate, disregarded by the Legislature in 1793, for both classes alike are admittedly within the scope of Section 10 of Regulation XIX of that year. The words of that Section are "All grants "for holding land exempt from the payment "of revenue, whether exceeding or under 100 "beegahs, that have been made since the 1st "December 1790, or that may be hereafter made "by any other authority than that of the Go- "vernor General in Council, are declared null "and void;" and it is not unimportant to remark that the words here used to describe the character of the grants are identical with those used for the like purpose in Section 3. Having declared grants to be null and void under the prescribed circumstances, the same Section authorizes and requires the proprietor of the estate "to collect the rents from such lands" (those to which the void grants applied) "at the "rates of the pergunnah, and to dispossess the "grantee of the proprietary right in the land, "and to re-annex it to the estate or talook in "which it may be situated, without making "previous application to a Court of Judicature "or sending previous or subsequent notice of "the dispossession or annexation to any officer "of Government;" and it further provided that the proprietor should not be liable to any increase of assessment on account of any such grants as he should resume or annul. The effect of this Section seems to be, *first*, to give the proprietor the largest possible right as against the terre-tenant to the possession of all lands within the ambit of his estate which may be claimed to be held free of payment either to him or to Government by virtue of an alleged grant purporting to be made *since* 1*st December* 1790 by his predecessor in the estate or any other alleged competent authority; and with this right to pos-

session, also the right to claim rent for those lands in the same way as if they had been let at the Pergunnah rates in ordinary course with the rest of his estate—all this without obliging him to make, on his part, any additional payment to Government, whether or not the land in question originally formed part of the assets on which his fixed jumma was assessed. Thus far, then, his situation relative to these two sets of lands, respectively appears to me to be as follows—namely, with regard to land which forms the subject of a grant for holding the same exempt from revenue, dated previously to the 1st December 1790, provided the amount does not exceed 100 beegahs, he is entitled to obtain from the terre-tenant an annual payment of a given fixed sum assessed originally by the Collector; and with regard to land which forms the subject of a grant for holding the same exempt from the payment of revenue, dated since the 1st December 1790, he is entitled to obtain, not a fixed sum, but the annual payment of such sum as accords with the rates of rent in the Pergunnah. He has, moreover, the further right to evict the claimant under the invalid grant, even summarily by force, without having recourse to a Court of Law.

Whatever be the intrinsic peculiarities of these two respective sets of rights, they both alike (the one by the express provisions of, and the other by necessary implication from the Statute) could be vindicated before the ordinary Civil Courts, and this admittedly remained the case until 1819. In that year was passed Regulation II, the 30th Section of which enacts that "all suits preferred in a Court of Judicature by proprietors, farmers, or talookdars, to the revenue of any land held free of assessment, as well as all suits so preferred by individuals claiming to hold lands exempt from revenue, shall immediately on their institution be referred to the Collector for investigation," &c. The appellants urge that this Section relates *solely* to suits by proprietors in respect of land which is claimed to be held exempt from payment under grants made *before the 1st December* 1790, and that it leaves untouched those where the exemption is claimed under a grant of later date. They then go on to argue that the latter cases are dealt with by Section 28 of Act X of 1859 which, after repealing Section 10 of Regulation XIX of 1793, enacts that "any proprietor or farmer who may desire to assess any such land, or to dispossess any such grantee" (namely, such land and such grants as formed the subject of the repealed Section), "shall make application to the Collector, and such application shall be dealt with as a suit under the provisions of this Act." According to the appellants, therefore, while the one set of suits may be instituted in the Civil Courts, subject to being immediately transferred to the Collector, the other can be instituted only before the Collector himself. They then contend that, by the words of the plaint before us, the plaintiff actually says that he brings the suit under Section 30 of Regulation II of 1819; and further, also, makes admissions which show that the pretended rent-free tenure is based on a grant made since the 1st December 1790, and consequently, as he brought the suit in the first instance before the Civil Court, it ought to have been dismissed for want of jurisdiction. With the view I take of the two Sections under consideration, I do not conceive it necessary to decide whether or not the plaintiff in his plaint made any admission of the kind alleged. For the mere statement that the suit is brought by virtue of a particular enactment does not affect the substantive character of the cause of action; and then taking the Sections in their chronological order, in my judgment, the words of Section 30 of Regulation II of 1819 are sufficiently *large* to embrace suits of both classes; and I see no sufficient indication that the Legislature intended their meaning to be restricted to the interpretation put upon them by the appellants. It is said that "suits preferred to the *revenue* of any land held *free of assessment*" can only apply where the claimant stands as it were in the shoes of Government, namely, where he claims in respect of land which has not been included in his revenue assessment, and in respect of which, consequently, nothing is paid to Government. But even this reasoning, which certainly gives a wrench to the sentence by referring "free of assessment" to the proprietor's relations with Government, while the claim of revenue is preferred against the terre-tenant, does not necessarily confine the operation of the Section to cases where the exemption is based on the allegation of a grant *before* the 1st of December 1790; for, as I have already explained, all Lakhiraj grants made *after* that period and *before* the Decennial Settlement of the particular estate which they affect, would deprive the Government of revenue; and Section 10 of Regulation XIX of 1793 would, as effectually, make the proprietor assignee of this revenue, as Section 5 of the same Regulation makes him assignee of that

which is the subject of earlier grants. I cannot assume that the probability of such intervening grants having been made, was absent from the mind of the Legislature when framing this Section; and consequently, as no express words of exclusion were used, I must take them to be within the purview of the words quoted; and if this be correct, the appellant's contention with regard to this Section fails, because it requires for its success that the dividing line for *all* cases should fall on the 1st December 1790. However, I go a step further. I think the phrase "revenue of any land free of assessment" is in its meaning co-extensive with the word "revenue," as it occurs in the next adjoining and correlative sentence of the same Section, namely, "individuals claiming to hold lands exempt from revenue;" and I cannot doubt but that these latter again embrace those persons who set up "grant for holding land exempt from the payment of revenue" within the meaning of Section 10 of Regulation XIX of 1793, which concerned grants made *since* 1st December 1790 only. It would seem anomalous that one and the same issue should be submitted to a different process of investigation, according as it arose, from the proprietor instituting proceedings for the assertion of his claim against the *soi disant* Lakhirajdar, or from the latter taking the initiative upon himself without waiting for his opponent's attack: and I see no sufficient reason for inferring that the Legislature intended to establish such a state of things. In my opinion, therefore, the words "suits preferred to the revenue of any lands held free of assessment" include as well suits to assess and recover (in pursuance of Section 10 of Regulation XIX of 1793) the "rents" withheld under pretence of a grant for holding land exempt from payment of revenue, as suits to recover (under Section 6 of the same Regulation) "revenue" withheld under pretence of a grant described in the same words. And to hold otherwise would lead to this consequence, namely, that the jurisdiction of the Court to entertain the proprietor's suit for compelling payment of dues withheld from him, would depend upon the nature of an undisclosed defence. Had this been desired by the Legislature, surely it would not have left so important a point without definite expression. But it is insisted very strongly that the purview of the whole Statute shows that it was directed solely to claims founded on grants made *before* 1st December 1790. With this I cannot concur. The conclusion which I draw from the purview is, that the Statute is confined to claims of alleged grants of exemption of whatever date. I quite yield to the reasoning of those who urge that the process and particular mode of investigation which this Regulation prescribes to the Collector's Court is extremely ill-adapted to solving satisfactorily, questions which may arise between a landlord and his tenants, or between him and his neighbours; but I do not think that the effect of Section 30 is to subject questions of such kind to the Collector's jurisdiction. Taking the Preamble in connection with the Regulation itself, it seems fairly clear that the object of the Legislature was to provide machinery for the special purpose of determining the validity of claims to be free of assessment, whether relied upon by a proprietor against Government, or by a terre-tenant against the proprietor, and for that purpose only. In the two cases the claim was essentially identical in character, and necessitated the same kind of proof. When Government took the initiative, no issue but this could arise, and the first twenty-nine Sections develope a special mode of trying it, having relation mainly to the circumstance that the Collector himself would be the Attorney-General, so to speak, of the Government. The Regulation still left all other cases open to the ordinary tribunals, *viz.*, all cases where the party initiating the contest was a private person, such as where the proprietor of the estate brought a suit against the Lakhirajdar, or the Lakhirajdar instituted his claim either against the proprietor or Government as the case might be, where, I may remark, the claim in question might be mixed up with divers other matters of proprietary right. Then comes Section 30, and this, as I read it, directed that if, in any suit of this kind, brought in the ordinary Courts, an issue as to the validity of the claim to exemption arose, whether alone or amongst others, that issue should be referred for investigation to the Collector, whose decision with regard to it should form an element in the final determination of the Civil Court; while all the other proprietary issues remained in the hands of the Civil Court alone, only in the case where Government was defendant (and therefore, he issue as to validity of grants of exemption could be the only issue) the Collector's decision determined the suit. And it should be observed that as in the former cases, the Civil Court, with its own course of appeal, could overrule the Collector, so in the latter, a particular mode of appeal from the Collector to the Civil Courts was specially

given. Now, I see nothing in this arrangement to oblige us, in the absence of express words, to say that this legislation obviously contemplated questions as to the validity of grants of exemption made *previously* to the 1st of December 1790, and these alone; or that it ought to be confined to these, because its wider operation would be subversive of civil justice.

Under the circumstances which attend the prosecution of the appeal now before this Court, I have thought it incumbent on me to give the foregoing somewhat lengthy explanation of the way in which I read Section 30 of Regulation II of 1819; but the view which I take of Section 28 of Act X of 1859 will, of itself, determine my judgment in this case. Section 10 of Regulation XIX of 1793 had, on the happening of a certain event, given the proprietor of the estate a summary personal power to assess and evict. The practice seemed to have been that the proprietor evicted at his peril, leaving the tenant to bring his action for the disruption of the Lakhiraj tenure—(*See* Vol. I, S. D. A. Rep. 1858., 464). This state of thing left an opening for much oppression: and Section 28 of Act X of 1859 corrects this by taking away the summary power of eviction, and substituting for it a proceeding of ejectment before the Collector in which the burden of proving that the event in question had happened, is imposed on the proprietor; for, until he shows that he sues in respect of "*such*" land or against "*such*" grantee as are respectively the subjects of "grants for holding land exempt from the payment of revenue made subsequent to the 1st December 1790," he has made out no case within this Section. It, in effect, says to the proprietor of the estate—"If you choose to base your claim to assessment, or possession, on the allegation that the defence to it rests upon an invalid grant made since 1st December 1790, prove that allegation to the Collector, and you shall have your summary remedy without further trouble." But I find nothing in the Section to take away from him any right of suit to the Civil Courts which he previously possessed. This interpretation, in no degree, as I conceive, conflicts with Bissumbhur Misser *vs.* Gunput Misser, I Marshall, 350, and is I think strongly confirmed by the circumstance that this Section is quite one-sided and makes no provision, nor does any other part of the Act, for the establishment on the part of the Lakhirajdar of his claims: an omission which does not occur in Section 30 of Regulation II of 1819.

Therefore, whether this suit is within the meaning of Section 30 of Regulation II of 1819, or not, I think it is well brought in the Civil Court.

Mr. Justice Jackson.—This is a suit for the resumption of certain rent-free lands. The plaintiff asserts that the defendant holds them on no good or valid title, while the defendant declares that he holds them under a Lakhiraj grant dated previous to 1790. The point raised in special appeal is that the Civil Courts have no jurisdiction to entertain the plaint, because, although the plaintiff seeks therein to have the suit tried under the provisions of Section 30, Regulation II of 1819, he also states that the land in question has been surreptitiously taken possession of as Lakhiraj after 1790; and it is urged that the jurisdiction to try the right of resumption of the Lakhiraj title to such lands has been, by Section 28 Act X of 1859, vested in the Collectorate Courts.

It is to be remarked, in the first place, that the suit has been treated in both the Lower Courts before which it was heard, as a suit preferred under Section 30, Regulation II of 1819; and the plaintiff in his plaint distinctly states that he brings his suit to be tried under the provisions of that law. The plaintiff has obtained a decree under that law. This Court should not, on special appeal, throw out the suit because there has been any careless wording in the plaint, the more so as the plaintiff's right to resume will, if not thrown out, be hereafter barred by the Law of Limitation. The Courts below and the parties have fully understood the nature of the claim, and only at this late stage of the case the question of jurisdiction has been raised, and raised also on a view of the plaint, which, it appears to me, was not contemplated by the parties in the Lower Courts. It is said that the plaintiff avers that the land has been taken possession of as Lakhiraj after 1790. The words in the plaint are that the defendants have taken possession of the land, and the rent derivable from it surreptitiously under pretence of a Lakhiraj title in the time of the former talookdar. These words do not, to my mind, definitely state that the land was taken possession of after 1790. Even, however, if the plaint did contain allegations sufficient to specify that it was the intention of the plaintiffs to charge the defendant with having fraudulently obtained possession of the land as Lakhiraj after 1790, it appears to me that the jurisdiction in the suit would lie in the Civil Courts. The provisions of Section 28, Act X of 1859, do

not confer an exclusive jurisdiction on the Revenue Courts. Applications preferred under that Section are similar to applications preferred to the same Courts under Sections 25 and 26. They are in the nature of summary applications; and orders passed on such applications are revisable in the Civil Courts, and suits may be preferred direct to the Civil Courts without the intervention of any application to the Revenue Courts by parties seeking for the redress to which those Sections relate. Act X of 1859 lays down, in the clearest language, the particular suits, to try which an exclusive jurisdiction is vested in the Revenue Courts. I allude to the concluding words of the 23rd and 24th Sections. The 151st Section also lays down that no *judgment* of a Revenue Court in any suit under the Act shall be open to revision or appeal, except as declared in the Act. It also points out what *orders* passed under the Act are not open to revision or appeal. If decisions passed on applications preferred under Sections 25, 26, and 28 of the Act, are orders, those orders are nowhere declared final, or not open to revision. If, on the other hand, they are judgments in suits, they are clearly declared not open to revision. This Court has, in former special appeals, ruled that the decisions under Sections 25 and 26 are orders; but that the decisions under Section 28 are judgments. The word "orders" is distinctly used in the 25th and 26th Sections; but unfortunately in the 28th Section, neither the word "orders," nor the word "judgments," is used. In all these Sections "application" is the word used to designate the form of claim, and the procedure under which the "application" is to be tried is that applicable to suits. These applications are, it appears to me, in the nature of summary applications, on which, if the plaintiff can show good cause for obtaining the assistance of the Revenue Authorities, he can obtain an order from them to enforce his rights. I see no sufficient reason for making any distinction between the decisions of the Revenue Authorities passed under these three Sections.

If, however, it is a point which is not open to further dispute, as having been already decided by a full bench of the Court, that decisions under Section 28 are judgments in suits, and the jurisdiction to try such suits is thereby vested exclusively in the Revenue Courts, I would still argue that the jurisdiction of the Revenue Courts under that Section must be confined strictly to the cases to which Section 10, Regulation XIX of 1793 relates. Section 28, Act X of 1859, only substitutes a new form of procedure where parties wish to dispossess grantees who hold unde grants subsequent to 1790. Where a landholder could have ousted a Lakhirajdar under Section 10, Regulation XIX of 1793, of his own accord, he is now directed by Section 28, Act X of 1859, to make application to the Collector, and obtain an order from him declaring his right to oust the alleged Lakhirajdar before he proceeds to oust him. But the right of action of the landholder under the former law, and the jurisdiction of the Revenue Courts under the present law, are confined to cases where it is clear and undoubted that the Lakhiraj title set up is one dated after the year 1790. If the Lakhirajdar sets up a title anterior to 1790, the Revenue Courts has no longer any jurisdiction to try his title. It might try his title for the purposes of trying the plaintiff's application, but no decision of a Revenue Court in such a title would be a final decision. A Lakhirajdar, who sets up a title anterior to 1790, is entitled to have his claim to hold his Lakhiraj estate under that title declared valid or invalid only by the Civil Courts, or if by the Collector, then only under the provisions of Section 30, Regulation II of 1819, with power of appeal to the Civil Courts.

If I look, then, to the wording of the plaint, my impression is that, in the view of it which the Lower Courts have taken, it is correctly preferred in the Civil Courts. But that impression is much confirmed, if I go beyond the plaint and determine the jurisdiction according to the issues which have arisen in the suit, and which have been tried and decided with the consent of both parties, or at least without any objection from the special appellant, as is visible from his appeal to the Lower Court.

There has been much argument in the case as to whether a suit in which there was a distinct allegation that the defendant held under a Lakhiraj title of a date subsequent to 1790 could, after the passing of Section 28, Act X of 1859, be preferred in the Civil Courts. It is, on the one hand, said that such a suit can be preferred under Section 30, Regulation II of 1819, and tried under the provisions of that Regulation. It is on the other hand said, that such a suit does not come within the provisions of that law, but, before the passing of Section 28, Act X of 1859, could only have been preferred under the general law, (Section 3, Regulation III of 1793), and, after the pass-

ing of Section 28, Act X of 1859, could only be brought under that law.

Those who hold the former view allege that the jurisdiction to try such suits still exists in the Civil Courts. Those who hold the latter view allege that the jurisdiction no longer exists in the Civil Courts, but is exclusive in the Collector's Courts. My impression is that Section 28, Act X of 1859, as I have above pointed out, confers no exclusive jurisdiction on the Collector's Courts. It appears to me, then, immaterial whether the jurisdiction to try a claim for the resumption of land alleged to be held under a Lakhiraj grant after 1790, which it is admitted did exist in the Civil Courts, was one which they obtained under Section 30, Regulation II of 1819, or under the general law (Section 8, Regulation III of 1793). In either case, I am of opinioin that that jurisdiction still remains with the Civil Courts. And in whatever mode the suit was brought, I would apply the rule which is declared in the Preamble of Regulation XIX of 1793, namely, that the ruling power is entitled to a certain proportion of the produce of every beegah of land, and call upon the Lakhirajdar to prove that he holds any title to hold land rent-free in contravention of this old and long established rule. Certain Sections of Regulation XIX of 1793 distinctly throw the burden of proof on this point on Lakhirajdars, who held under grants dated prior to 1790. No special rules were enacted regarding the trial of grants subsequent to 1790 in Regulation XIX of 1793. But it cannot be supposed, looking to the terms of Section 10 Regulation XIX of 1793, that a less stringent mode of procedure was to be adopted with Lakhirajdars holding under grants of a date subsequent to 1790 then with Lakhirajdars holding under grants prior to that date. In both cases the same presumption would apply, that their titles were invalid until the Lakhirajdars could prove them to be valid.

It still remains to consider what was the effect of Section 30, Regulation II of 1819, with respect to the procedure as regards suits for the resumption of lands held under grants subsequent to 1790. It is said that Section 30 Regulation II of 1819, applies only to grants anterior to 1790. But there is nothing in the wording of that Section alone to lead to that conclusion. A piece of land, which is held rent-free under a grant, dated after 1790, is virtually held free of revenue and of Government assessment, as well as of the zemindar's assessment. That piece of land does not contribute to the Government revenue. It may be that the Government has assessed it at the Decennial Settlement. But the holder has contrived by some means to escape paying that share of the revenue which was assessed on it, and so far as the holder of that land, in the words of Regulation II of 1819, has defeated the just rights of the Government as well as of the zemindar. In Section 10, Regulation XIX of 1793, the same wording is used as in the other Sections of that Regulation, shewing that the Legislature considered that every beegah of land which did not pay rent and was rent-free was also to be considered revenue free, and that Government would not tolerate not only revenue free invalid grants, but also rent-free invalid grants. In fact, it applied a far stricter rule with the latter grant than with the former. The latter were specially declared all invalid, unless sanctioned by the Governor General in Council. The former were admittedly valid if held on good title.

If, then, the wording of Section 30, Regulation II of 1819, is sufficient to include the trial of suits to resume land held under Lakhiraj grants after 1790, on the ground that such grants are virtually free of Government assessment, the next question is whether it has always been the custom of the Courts to admit such suits for trial under that law. There appear to be precedents in the old reports, shewing that such suits have been preferred under that Regulation, and have been sent to the Collector for report, and ultimately decided. I am not aware of any such suit in which the defendant has admitted that he holds under such a title; and therefore, although plaintiff may have preferred suits alleging that Lakhirajdars hold under such titles, the issues in such cases have always turned upon other points. The Lakhirajdar has always set up a title anterior to 1790, and the question for trial has always been the defendant's allegation of that title prior to 1790. If he shows he really holds some such title, then the question is whether it is a valid title. If he holds no title at all prior to 1790, then it is held that he holds under no title at all, and he may be even dispossessed.

I cannot help thinking that, in all this contention regarding grants subsequent to 1790, we are contending with a shadow. There are very few cases on record in which zemindars have preferred a suit alleging that a Lakhirajdar held under such title, and similarly hardly a case in which a Lakhirajdar ever alleged, in answer to any resumption suit, that he held under such a title. There are some

exceptional cases in which it is attempted to support such grants, on the ground that, though no rent is paid annually, still a certain consideration equivalent to rent is paid; and there have been other attempts on other grounds to have such grants declared valid. But such cases are very few indeed, and may be looked upon as quite exceptional. Section 28, Act X of 1859, gives jurisdiction in such cases to the Collector; but not an exclusive jurisdiction. It may be that, in passing Section 30, Regulation II of 1819, the Legislature never contemplated cases in which the Lakhirajdar would destroy his own title by making any such averment as that he held under a grant after 1790. But there is nothing in that law to prevent the Collector from reporting on such a case; and it appears to me absurd to suppose that, on a Lakhirajdar making such an averment, the Collector would no longer have any jurisdiction to report upon the case or the Civil Court to try it, until a new suit was brought. I would, therefore, record my opinion that Section 30, Regulation II of 1819, refers not only to cases where land is said to be held free of Government assessment on grants anterior to 1790, but also to cases where land is equally held free of Government assessment, in that it does not pay any Government revenue or assessment in the shape of rent, although it was included in the assessment at the Decennial Settlement.

I would consequently disallow the objection to jurisdiction which is raised in this appeal.

The Weekly Reporter,

APPELLATE HIGH COURT.

No. 7.] MARCH, 1865. [Vol. II.

The 25th January 1865.

Present:

The Hon'ble H. V. Bayley, and A. G. Macpherson, *Judges.*

Construction of Ekrar—Rent.

Case No. 333 of 1864.

Regular Appeal from a decision passed by the Judge of Jessore, dated the 7th June 1863.

Mohima Chunder Ghose (Defendant), *Appellant,*

versus

Raja Burodakant Roy (Plaintiff), *Respondent.*

Baboos Kally Mohun Doss, Banee Madhub Banerjee, and *Prosunno Coomar Bose* for Appellant.

Baboo Obhoy Churn Bose for Respondent.

A ganteedar having assigned over his gantee tenure to A, who agreed to pay to the zemindar not only the gantee rent reserved, but also rupees 100 a year until a debt due from this ganteedar to the zemindar was paid off—HELD that, where the assignee having mortgaged his tenure, it was subsequently sold by the mortgagee, the purchaser was liable to pay the rupees 100 annually as well as the original gantee rent reserved.

PLAINTIFF sued to recover rupees 371-4 annas due upon an ekrar executed by one Hurnarian Ghose on the 1st Phalgoon 1253 to Mohima Chunder Ghose. Mohima Chunder Ghose was a ganteedar on the plaintiff's zemindaree, and, as such, had to pay plaintiff an annual gantee jumma of rupees 525-13-10. The plaintiff's contention is that, by this ekrar, Hurnarian stipulated to pay a debt of rupees 2,300 due by Mohima Chunder to plaintiff, by instalments of rupees 100 per annum from 1253 to 1275 B. S. The plaintiff alleges that the rupees 100 thus annually due, had not been paid for the years 1266, 1267, and 1268,—making rupees 300, which, with interest rupees 71-4 annas, formed the total of his claim, rupees 371-4. Defendants, the widow and sons of Hurnarian, admitted the ekrar, and the obligation created by it to pay rupees 100 per annum to plaintiff on account of a debt of Mohima; but pleaded that the liability could only last so long as the gantee remained that of Mohima, but that Mohima subsequent to the date of the ekrar mortgaged the gantee to one Surbosoonduree, and that mortgage not being duly redeemed, Surbosoonduree foreclosed, and then sold the gantee to the defendant, widow of Hurnarain Ghose. They contended that the widow, in this new position, was not liable under the ekrar of her husband, which only required a payment in respect to the additional annual rent of rupees 100 to plaintiff *so long as the gantee itself remained* with the assignor Mohima, but no longer.

Upon these pleadings and the evidence in the case, the Judge decided that "the "mortgage after ekrar in no way bound the "mortgagee to pay the debts of the mortga-"gor; and if the real mortgagee was not "bound, the assignor of the mortgage was not "bound." The Judge, however, proceeded—"But the defendants accept the position of the "heirs, and are bound to pay the debts of Hur-"narain Ghose, and in that way become an-"swerable to the plaintiff in this suit." The Judge accordingly decreed plaintiff's claim.

The defendants appeal, and their contention here is substantially the same that it was below, *viz.*, that the payment of the rupees 100 per annum was a liability of

additional *rent* to that extent; and that when the gantee itself passed from the assignor, the liability for that additional *rent* passed to the assignee. In this view it has been pressed upon us that the terms of the ekrar show that the liability was to cease with any transfer of the gantee, and that the payment was only to be made out of the *rent-profits* of the gantee as long as it was in the hands of the assignee.

We have carefully considered the terms of the ekrar, and we are of opinion that Hurnarain covenanted, in consideration of the assignment of the gantee-tenure to pay rupees 525 per annum gantee *jumma* or rent to the plaintiff as zemindar (getting one receipt for that payment), *and also* to pay rupees 100 per annum to the plaintiff for 23 years with a view to liquidate a debt of rupees 2,300 due by Mohima Chunder to plaintiff (getting a separate receipt for that),—this last not as *rent*, but as a payment of *debt* undertaken by Hurnarain. The mere statement that the sum was to be paid out of the profits, does not make that *rent* which in fact was *money* due irrespective of the current rent. It is pressed on us that the sum mentioned is rupees 625. It is so; but it is not mentioned as one sum of rent, but as two sums to be paid under separate receipts, one for gantee *rent* of rupees 525, and another for rupees 100 payble out of the *profits*, *i. e.*, out of whatever more Hurnarain could make of the tenure. Mohima Chunder's gantee was in fact taken in mourosee by Hurnarain on his agreeing to pay rupees 525 and rupees 100. No subsequent mortgage could get rid of this mourosee or of the agreement: and the liability of Hurnarain and his heirs would not cease with the transfer of the ganteedar's rights by the creation of the mortgage and the foreclosure which followed. On the contrary the purchaser from the mortgagee can only have bought the tenure subject to the mourosee; and the mouroseedar and his heirs remain liable to fulfil the conditions entered into by him.

This being our opinion, it only remains to dismiss the appeal with costs, which we accordingly do.

The 26th January 1865.

Present:

The Hon'ble C. B. Trevor and A. G. Macpherson, *Judges.*

Limitation—Suit for damages against servant misappropriating money entrusted to him for a particular purpose.

Case No. 1950 of 1864.

Special Appeal from a decision passed by Mr. W. Ainslie, Judge of Patna, dated the 21st April 1864, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 9th January 1864.

Sheikh Amjud Ali (Plaintiff), *Appellant,*

versus

Syud Ali Buksh and others (Defendants), *Respondents.*

Messrs. A. F. Lingham and *J. Baptist*, and *Baboo Debendur Narain Bose* for Appellant.

Mr. R. E. Twidale for Respondents.

The limitation applicable to a suit for damages arising from the act of a servant in not making payment of a sum of money which had been entrusted to him for a particular purpose, is 6 years, under Clause 16 Section 1 Act XIV of 1859.

PLAINTIFF sued to recover a certain sum amounting to rupees 1,990, principal and interest, which he had transmitted to his gomastah for the purpose of making a certain payment, but which had been misappropriated by that person.

The defendant pleaded limitation and non-liability.

The first Court found that limitation did not, under Clause 16 Section 1 of Act XIV of 1859, bar the suit, and on the merits dismissed plaintiff's suit.

The Judge, on appeal, considered that the suit was founded on an injury to personal property, and as it was not brought within one year from the time at which the cause of action arose, plaintiff was out of Court under Clause 2 Section 1 Act XIV of 1859.

Plaintiff now appeals specially, urging that the present suit can, in no sense, be said to be an injury to personal property; and as it is a suit for the nature of which no particular limitation has been fixed, it falls under Clause 16 Section 1 Act XIV of 1859, that is, the period of limitation is six years from the cause of action, and the suit should be remitted for investigation.

The suit is for damages arising from the tortious act of the defendant, a servant of the plaintiff, in not making payment of a sum of money which had been entrusted to him for a particular purpose. Now, we think that there is no question that this is not an action for damages for injury to personal property. At the same time this case does not fall under Clause 9 of Section

1, and no other Clause is specially applicable to it; it falls, therefore, we think, as contended by plaintiff's vakeel, under Clause 16, and the period of six years from the time at which the cause of action arose is allowed. The plaintiff is, therefore, clearly within time, and the case must be remitted to the Judge for investigation on its merits.

The 26th January 1865.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Hindoo Law (Mitackshara)—Inheritance—Step-brother—Uterine brother's son.

Case No. 2542 of 1864.

Special Appeal from a decision passed by Moulvie Itrut Hossein Khan, Principal Sudder Ameen of Sarun, dated the 15th July 1864, *reversing a decision passed by Baboo Luchmun Pershad, Moonsiff of Pursa, dated the 17th March* 1864.

Burhum Deo Roy (Defendant), *Appellant,*

versus

Punchoo Roy (Plaintiff), *Respondent.*

Mr. John Baptist and *Baboo Kishen Succa Mookerjee* for Appellant.

None for Respondent.

According to the Mitackshara Law, a step-brother inherits after the widows if he survives them; otherwise a uterine brother's son succeeds.

THIS is a case of disputed succession. It appears from the record that Durmosa Roy had two wives. By the first, he had a son Leckraj Roy; by the second, two sons, Sheo Pershad and Jokee Roy.

The special respondent, Punchoo Roy, is the son of Leckraj; and the special appellant, the son of Juggoo, who was the son of Jokee.

The family separated, and Sheo Pershad lived in commensality with his uterine brother Jokee.

Sheo Pershad died, leaving two widows, Phoolbas Koour and Aughur Koour; and they succeeded to, and retained possession of, the property till the death of the last surviving one.

The Principal Sudder Ameen held that as Leckraj Roy was the heir of his half-brother Sheo Pershad, on the death of the widows, therefore, the special appellant, who is Leckraj's son, is entitled to succeed.

We think that the Principal Sudder Ameen has missed the point of this case. According to the principles of the Mitackshara Law, by which this suit is confessedly governed, the step-brother, or Leckraj Roy, would be the heir after the widows, if he survived them, that is, failing him, the uterine brother's son, or Juggoo, the father of the special appellant, would succeed; so that until it be found whether or no Leckraj Roy survived the widows of Sheo Pershad, it is impossible to decide between the respective claims of the parties.

If Leckraj Roy survived the widows, his son, the special respondent, would be the heir; if not, then the special appellant would succeed, as it is not contended that Juggoo pre-deceased the widow.

The case must, therefore, be remanded. The Principal Sudder Ameen will fix issues on the points aboved noted, and decide the case accordingly. Costs will follow the result.

The 26th January 1865.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Hindoo Law—Presumption (Ancestral property)—Exparte case—Good Faith.

Case No. 2500 of 1864.

Special Appeal from a decision passed by Baboo Koylas Chunder Deb, Principal Sudder Ameen of the 24-Pergunnahs, dated the 15th July 1864, *modifying a decision passed by the Sudder Ameen of that District, dated the 4th February* 1864.

Ram Dhone Bhuttacharjee (Plaintiff), *Appellant,*

versus

Ishanee Dabee (Defendant), *Respondent.*

Baboos Tarrucknath Sein and *Kalee Prosunno Dutt* for Appellant.

Baboos Unnodapershad Banerjee, Hem Chunder Banerjee, and *Romesh Chunder Mitter* for Respondent.

Some brothers having possessed property jointly, the presumption is that their representatives are entitled only to the shares which belonged to the brothers under whom they respectively claim.

Even when a suit proceeds *ex-parte*, a plaintiff cannot get a decree without proving that he is entitled to the relief he prays for.

The first duty of a purchaser from a Hindoo childless widow, is to satisfy himself, as an ordinary prudent man would do, as to her right to sell. If he does not do so, he does not act with due care or attention in the matter, and, therefore, cannot be said to have acted legally in good faith, although he may, in fact, fully believe or take it for granted that all is right.

When a decree is given to put the plaintiff in possession of lands, leave cannot be reserved to the defendant to remove buildings, &c., erected by him on the land if it be not proved that the defendant in erecting them acted in "good faith."

THE plaintiff (who is now before us as appellant) sued to recover certain lands as heir of Manick Chunder Bhuttachargee deceased. His case was that the lands originally belonged to his maternal grandfather, Radhakant; that, on his death, they descended, by inheritance, to his son (who was plaintiff's uncle) Manick Chunder; that, on Manick Chunder's death without issue, the lands went to his widow, Bhobosoondery, who was entitled to the interest of a childless Hindoo widow in them; and that, on Bhobosoondery's death in 1267, they came to the plaintiff as reversioner. The property sued for contains about 61 beegahs. Of these, 5 cottahs are homestead lands; the remaining lands are quite distinct and are resumed rent-free lands situated in the Midnapore district. The claims of the plaintiff as regards the homestead lands is resisted by a different set of defendants from those who resist his claim as to the Midnapore lands.

The plaintiff stated in his plaint that he was kept out of possession of the Midnapore lands by the defendant, Bisto Chunder; but Ishanee Dabee (a respondent in this Court) was subsequently added as a defendant, and has defended the suit as regards these lands, which she claims as her own under a *kubala*, or bill of sale, from Bhobosoondery, dated the 17th Falgoon 1266. Ishanee Dabee, in her written statement, sets forth that the lands she claims were originally ancestral rent-free lands, belonging to Radhakant (the plaintiff's grandfather) and his six brothers; that the lands were resumed by Government, and, after being so resumed, were settled with Bhobosoondery, who alone came forward and claimed to have the settlement made with her; that Bhobosoondery for many years held the lands under the settlement as being the only person having an interest in them, and that she sold to her (Ishanee) as she had full power to do. Thakoor Poramanick was made a defendant and resisted the plaintiff's claim as to 2½ cottahs, *i. e.*, one moiety of the homestead, his case being that these 2½ cottahs had been sold by Bhobosoondery to one Gungadhur, by whom again they were sold to him, Thakoor Poramanick; and one Kessub Chunder was made defendant as claiming the remaining moiety of the homestead. Kessub Chunder, however, has not appeared in the suit, or taken any defence or any part however in the proceedings. The Court of first instance held that Bhobosoondery was entitled only as being a childless widow; and that, as no necessity for the alienation by her was proved, it must be set aside. A decree in favor of the plaintiff was given for the Midnapore lands, but the suit was dismissed as to the homestead.

The Lower Appellate Court took an entirely different view of the case. The Court considered that the plaintiff had failed to prove that Radhakant (and consequently Manick Chunder through whom the plaintiff claimed,) had ever been entitled to more than one-seventh of the Midnapore lands, and was of opinion that it appeared that these lands originally belonged to Radhakant and his six brothers. The Court accordingly set aside the decree which had been passed, so far as it gave the plaintiff more than a seventh share in the Midnapore lands, but decreed that the plaintiff was entitled to recover the moiety of the homestead held by Thakoor Poramanick, leave being reserved to Thakoor Poramanick to remove, before giving plaintiff possession, certain buildings erected by him (or by Gungadhur, from whom he purchased) on the property.

From this decree the plaintiff appeals specially. His first ground of appeal is with reference to the Midnapore lands. He complains that, as to these, the Court has erred in considering it was necessary for him to prove, as against Ishanee Dabee, what was the precise nature of the interest taken in these lands by Manick Chunder—in other words, that it did not lie upon him to prove that Manick Chunder succeeded to the whole, and not merely to one-seventh of the property. He contends that as Ishanee Dabee set up a sale to her from Bhobosoondery, and rested her title exclusively on that sale, not denying the facts alleged by the plaintiff as to the possession of the lands by Bhobosoondery, Manick Chunder, and Radhakant, respectively, there was no necessity for him to prove that the whole estate belonged to Radhakant. We think, however, that the ordinary rule of law in all such cases must prevail, and that it lies on the plaintiff, who sues to eject Ishanee Dabee from the lands which are in her possession, to prove his title to these lands. Ishanee Dabee has never admitted any superior title in the plaintiff. It is true that she claims through Bhobosoondery; but she alleges that Bhobosoondery conveyed the property to her

absolutely, having a right so to do. This is no such admission as could in any decree relieve the plaintiff from the necessity of proving his title. The Lower Court finds that the property belonged to Radhakant and his six brothers. The presumption, therefore, is that the plaintiff is entitled to no more than one-seventh; and it certainly was for him to get rid of this presumption, which he has not done. The appeal is, therefore, dismissed so far as it relates to the Midnapore property.

The remaining grounds of appeal refer to the homestead. As to the 2½ cottahs alleged to be claimed by the defendant, Kissub Chunder, the appellant urges that he is entitled to our judgment, inasmuch as Kissub Chunder has not chosen to appear and defend the suit. But we think that the Lower Court, as it held that the plaintiff had not proved his title to those lands (though we do not exactly understand why it is so held, when it at the same time found that he had made out his title to the other moiety,) was right in considering that no decree for possession of those 2½ cottahs could be given. Even, in an *ex-parte* case it is undoubtedly necessary for the plaintiff to prove that he is entitled to the relief which he prays for. In the present instance, the plaintiff has, according to the finding of the Lower Court, failed to do this, and, therefore, the appeal on this ground also must be dismissed.

The last ground of appeal is as to the permission which has been given to Thakoor Poramanick to remove the buildings, &c., on the 2½ cottahs which he claims, but for which a decree has been given to the plaintiff. The plaintiff contends that no such permission ought to have been given. It may be that Thakoor Poramanick and Gungadhur, through whom he claims, were, in a certain sense, *bonâ fide* purchasers, that is to say, it may be that neither of those persons intended to defraud any one, or to buy any thing but a good title. But good faith in its legal sense, the only sense in which it can be pleaded for the purpose for which it is pleaded by Thakoor Poramanick, means much more than mere absence of bad faith. A purchase from a childless widow, who sells without sufficient necessity, cannot, in our opinion, be said to be made in good faith. Nothing can legally be said to be done or believed in good faith, which is done or believed without due care or attention. The first duty of a purchaser from a widow, and of a purchaser from such a purchaser, is to satisfy himself as an ordinary prudent man would do as to her right to sell. If he does not do so, he does not act with due care or attention in the matter, and, therefore, cannot be said to have acted legally in good faith, although he may, in fact, fully believe or take it for granted that all is right. In the present case the sale has been found to have been made by the widow under no sufficient necessity, and it has been declared to pass no interest in the property beyond her life. The ordinary rule of law is that the buildings erected on the land, and all other fixtures, should go with the land, and we see no reason why this rule should here be departed from. So much, therefore, of the decree of the Lower Court as permit the removal of these erections and fixtures is set aside.

The decree is altered accordingly. The appellant will pay the costs of all parties, save of Thakoor Poramanick, who will bear his own costs of this appeal.

The 26th January 1865.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Hindoo Law—Leper—Disinheritance by reason of disease.

Case No. 360 of 1864.

Regular Appeal from a decision passed by Baboo Greesh Chunder Ghose, Principal Sudder Ameen of the 24-Pergunnahs, dated the 20th June 1864.

Issur Chunder Sein and Luckhee Monee Dossee (Defendants), *Appellants,*

versus

Ranee Dossee (Plaintiff), *Respondent.*

Baboo Kalee Prosunno Dutt for Appellants.

Baboo Prosunno Coomer Sein for Respondent.

Suit laid at rupees 9,347-2 annas.

Where it is contended that a Hindoo is incapable of inheriting by reason of an incurable disease, the strictest proof of the disease will be required.

THE appellants were the defendants in the Lower Court. The plaintiff, who is the respondent before us, sued to have an alleged will of her deceased husband, Nil Comul Sein, and an adoption which was made under it, declared void and set aside, and also for possession of one moiety of the said Nil Comul Sein's estate, and to recover certain property of her own. Her case is that Nil Comul Sein died, leaving two widows, herself and

the defendant Luckhee Monee; that died without issue and without a will; that immediately after his death the defendant Issur Chunder came to his house and carried off a large amount of property, some of it belonging to Nil Comul's estate, and some of it belonging to the plaintiff herself; that subsequently Issur Chunder set up a false will, which appointed him executor, and directed the defendant Luckhee Monee to adopt a son; that Luckhee Monee, who was the deceased's younger widow and sister-in-law of Issur Chunder, has been throughout these matters in collusion with him, and about two months after the death of Nil Comul, went through the farce of adopting Issur Chunder's son; that the will is a forgery and void, and the adoption is also void; and that the plaintiff and Luckhee Monee, as the two childless widows of Nil Comul, are entitled each to a moiety of his estate.

The defendants plead that the will is no forgery, but is the will of Nil Comul; that the adoption has been made in accordance with the provisions of the will; that Issur Chunder has possessed himself, as he lawfully might, of the estate of Nil Comul, but of nothing which was the personal property of the plaintiff; and that the plaintiff is a leper, and, as such, cannot, according to Hindoo Law, inherit or be entitled in any way to claim to represent her husband's estate or any portion of it.

The Lower Court has found that the plaintiff is not a leper; that the will is a forgery; and that the defendant, Issur Chunder, possessed himself of, and must account to the plaintiff for, Nil Comul's estate, and also for a large amount of property which belonged to the plaintiff personally. A decree accordingly has been given in favor of the plaintiff.

Against this decision the two defendants appeal. They contend that, on the evidence, it is clear that the plaintiff is a leper, or, if not a leper, is afflicted with some such incurable disease as, according to Hindoo Law, renders her incapable of inheriting; and they repeat their original plea that the will and adoption are genuine and valid, and that no private property of the plaintiff has been carried off by Issur Chunder, or at any rate not nearly so much as the Lower Court finds has been carried off.

As regards the first issue, whether the plaintiff is debarred from inheriting by reason of leprosy or other incurable disease, we concur in the finding of the Lower Court. Persons who, under ordinary circumstances, would undoubtedly inherit, are not to have their claim lightly set aside on the ground of disease; and, in our opinion, no such person ought to be set aside or declared to be diseased within the meaning of the Hindoo Law on this subject, except upon the clearest and most unquestionable evidence. In the present case, the evidence is of the weakest possible description. Of the particular disease which the defendants set up in their written statement, there is no reliable evidence. As the Lower Court has remarked, the witnesses examined on the defendant's behalf to prove the plaintiff's leprosy, were but casual visitors to her, and unworthy of belief: "their evidence, moreover, is of no weight, inasmuch as they did "not appear to possess knowledge enough to "be able to distinguish one disease from another." Further, the plaintiff appeared in the Lower Court to support in person her application for leave to sue as a pauper, and the Court records in its judgment that there was nothing visible about her to lead to the supposition that she was a leper. But it is said that, although the defendants have failed to prove leprosy, still, on the testimony of the Native Doctor whose evidence was deemed trustworthy and acted upon by the Lower Court, the plaintiff has "atrophy of the bones,"—an incurable disease, which, under Hindoo Law, is a cause of disinheritance. It is true that the Native Doctor referred to says, that the plaintiff has had some affection which he calls "Drying up (*shooshko*) of the bones," for which he has treated her some six years or more; and he adds that, inasmuch as this disease has not yielded to his treatment, he considers it to be incurable. The defendants have, however, failed wholly to establish their plea, which is that the plaintiff is a leper; and it would need far stronger evidence than the mere opinion of one native Doctor to convince us that that plaintiff is labouring under some other disease of a different description—not leprosy, but incurable and rendering her incapable of inheriting. If, under ordinary circumstances, the strictest proof would be required of the disease causing the disinheritance, still further proof, if possible, is requisite when the disease which it is attempted to prove, is different from the disease pleaded and on which the defence was originally rested. On the whole, we fully agree with the Lower Court in thinking that it is not proved that the plaintiff is, on account either of leprosy or of any

other disease, debarred from the right of inheritance.

We also agree with the Lower Court in thinking that the will which has been set up is a forgery; and we in substance adopt, and concur in, the observations which the Court has made on this part of the case. There is, in our opinion, but one piece of evidence, which really makes at all in favor of the defendants; and that is the evidence of Juggobundoo Bose, which, inasmuch as it shews that Nil Comul Sein had it in his mind to make a will, goes a considerable way towards clearing the ground for the positive evidence as to the execution of the will. But Juggobundoo Bose, though he proves that Nil Comul Sein had some intention of making a will, proves nothing else that is favorable to the defendant's case. On the contrary, he proves distinctly that the will, which Nil Comul wished to make was a will *not* in favor of Issur Chunder nor such as the will propounded.

Looking at the whole evidence we are quite satisfied that the *factum* of the will has rightly been held not to have been proved. The presumptions are all against the will. Its provisions are contrary to those of a draft will, which the deceased caused to be prepared very shortly before the time when this alleged will is said to have been executed; it substantially makes over the whole of the testator's property to Issur Chunder with whom the testator had no very close relations in his life—for the will makes Issur Chunder his executor: and it gives a power of adoption not to the elder but only to the younger widow, who was the sister-in-law of Issur Chunder, and who, before Nil Comul had been more than two months' dead, adopted the son of Issur Chunder. The whole scope and spirit of the alleged will are, in truth, directly opposed to those of the draft which was undoubtedly prepared a few weeks before by Juggobundoo Bose. Moreover, the will was not registered, although Nil Comul lived for a month after its alleged execution. To rebut the presumptions arising from these facts, there is only the positive evidence of a certain number of witnesses who speak to the writing and the execution of the will,—witnesses of a class whose testimony is of a character of all others the most unsatisfactory and unreliable in itself. We think the defendants have wholly failed to prove the will, and that it has rightly been set aside: and the adoption which is based exclusively upon it necessarily falls with it. The decree of the Lower Court is, therefore, so far as it relates to the estate of the deceased, confirmed.

But as regards the private property of the plaintiff carried off by Issur Chunder, we think the decree should be altered. The evidence as to the details of this property is not at all satisfactory, and we are not inclined to believe it fully, especially as it includes many articles which were not mentioned by the plaintiff herself when on a previous occasion she applied to the Court on the subject. On that occasion, the Nazir of the Court prepared a list based on the plaintiff's own statements; and as we think it unlikely that the plaintiff then understated her claim against Issur Chunder, we consider that it will be proper to take the Nazir's list as the basis on which Issur Chunder is now to account to her with respect to her private property. The decree will be altered accordingly; but, under the circumstances, the appellants will bear all the costs of the appeal.

The 26th January 1865.

Present:

The Hon'ble H. V. Bayley and G. Campbell, *Judges.*

Alluvial Lands.

Cases Nos. 186 and 188 of 1864.

Regular Appeal from a decision passed by Baboo Grish Chunder Ghose, Additional Principal Sudder Ameen of Backergunge, dated the 30th March 1863.

Mr. G. P. Wise and others (Defendants), *Appellants,*

versus

Moulvie Abdool Ali and others (Plaintiffs), *Respondents.*

Messrs. R. V. Doyne and *R. T. Allan* and *Baboo Onoocool Chunder Mookerjee* for Appellants.

Baboo Khetternath Bose for Respondents.

By Act IX of 1847 Government reserves its right under that Act till the period of re-survey. The *status* at re-survey, not the *status* at time of formation of the land, is to be looked to in the adjudication of such claims. Thus, where before re-survey land attaches to that of a riparian proprietor, and its *status* is that which under Clause 3 gives that proprietor a right, the opposite party is not entitled unless he can shew a title better than an award under Act IV of 1840.

Mr. Justice Bayley.—THESE two cases are, it is admitted by both parties, of the same

character as regular appeal No. 334 of 1864, decided by us on the 10th of January 1865,* in which we dismissed defendant's appeal.

The learned Counsel for appellant again urges that, as defendant is in possession under the award of a competent Court, *i. e.*, an award under Act IV of 1840, plaintiff must prove his title to the land in suit in this case under Clause 1 of Regulation XI of 1825 before defendant's possession can be disturbed, and that she has failed to do so, inasmuch as at the *status* of the land must be looked to, as the period when it first became land from water, and thus became property to which a right vested in some one; that the original *status* of the land was that of an island to which plaintiff could have no title, but only Government could; that, if the *status* at the time of re-survey were to be regarded as the basis for fixing the right, it would follow that the vesting of right might depend simply on the caprice of a constantly changing river, such as those are in the part of the country where this land is; that such could never have been the intention of the Legislature in enacting either Regulation XI of 1825, or Act IX of 1847; that the former, which is still the *substantive* law, was not altered or modified by the latter; that the former law was a *declaratory* law and defined rights, and that the latter was a law of *procedure* only, quite independent and irrespective of the former; Section 1, for instance, intimating that the object of the law was not to make assessments or assert rights except periodically, while Section 7 specially referred to rights as under Clause 3 Regulation XI of 1825, *viz.*, as based upon the *status* when the land in suit first became a property of some one. Mr. Doyne urged that if this were not the correct view, Government having a right to certain lands as islands at the time of the land forming from the water, would lose its rights and its revenues if it were to allow an altered *status* at re-survey as the guide to its claims, and by so doing let its rights be vested in another.

The only points on this argument which, I think, have not been answered by my judgment in the analogous case of regular appeal No. 334 of 1864, are, as regards the passages cited from Sections 1 and 7.

In respect to Section 1, I do not think that the law in that Section did more than state that the Government did not find it convenient to assert rights or to assess the lands (should the "assertion of rights" be admitted by the Courts as existing at the re-survey) except at certain intervals; but it no where declares that the assertion of rights shall be made at a re-survey according to a state of facts *antecedent to the survey*; and in respect to Section 7, it merely refers to Clause 3 Section 4 Regulation XI of 1825, not as shewing the *status* to be looked to as vesting right at the re-survey to be the *status* antecedent to that re-survey; but it merely sets forth that the principle laid down in that law in defining what state of circumstances should give the right to a riparian proprietor, and what to Government, should be followed. The law, moreover, is to be read not only by those Sections or Clauses, but by the whole context.

I think that I have clearly shewn in my judgment in regular appeal No. 334 before referred to, that the assertion of the rights of Government is to be made in the *state of circumstances as they may be found at re-survey*, and not on the antecedent state. It follows that, as the land in suit here is now separated from plaintiff's chur Kulkinee by a fordable stream, the *status ante*, *i. e.*, the state of the original formation of the land out of the water as an island, is *not* to be looked to. Consequently, Clause 3 Section 4 (taking Mr. Doyne's view of Regulation XI of 1825 as declaratory of rights) would, under the above state of facts, vest the right in this property in plaintiff. Plaintiff then (as I said before in my judgment in No. 334), has proved his title sufficiently to require defendant to rebut plaintiff's case, by proving his plea of the re-formation of these lands on the original site of diluviated lands of defendant's chur Selimpore, and this fact defendant has not proved. I would here add merely to my preceding remarks, and to those in my *next* judgment in No. 334, that Regulation II of 1819 authorized the resumption and assessment of churs and islands. Then Regulation XI of 1825 placed them, if islands, *at once* at the disposal of *Government* as its absolute property; if churs liable to resumption, they become *at once* open to assessment. I apprehend Government found that the claims of Government and the land-owner in such cases as the character and identity of the land, especially whether the land-owner had not some claim to indulgence in the Revenue Department, is not of right in the Civil Court to retain them owing to diluvion of other lands or other causes, caused such constant trouble and expense

* See *Ante* Vol. II, p. 34.

in every direction, especially as to intricate, protracted, and costly local investigations, that it found the gain by continuous assertion of rights was not worth the cost.

Then, and therefore, came Act IX of 1847, making the assertion of the rights of Government to cease to be continuous but only at intervals of years.

In this view of the case No. 334, and of these Nos. 186 and 188, on which last Mr. Doyne has amplified his argument in No. 334, I would dismiss defendant Wise's appeals with costs.

Mr. Justice Campbell.—In the former case No. 334, I considered it clear that either Government had a right, or it had no right. If it had a right, then, by its answer in the suit, it ceded that right to the plaintiff; if it had no right, then plaintiff's right was, I considered as against the defendant, sufficiently made out.

In the present cases 186 and 188 there is no cession of the rights of Government to plaintiff, and I have maturely considered the effect of Act IX of 1847 as affecting plaintiff's rights. It seems to me that this Act is of a special nature for the purpose of restraining Government and Government alone, and so saving all parties from a constant and harrassing assertion of obscure rights of Government. As respects the right of Government to assess, that right is absolutely secured as regards *all* lands, to be exercised at intervals of ten years. But as regards the right of ownership which up to that time might be claimed by Government, I think that, if we construe Section 1 as suspending the right of Government to assert such ownership till the end of the ten years, Section 7 must also be taken, as it were, suspending for ever, and, in fact, taking away, the right of Government to assert a right of ownership in any lands as islands if they were not found to be islands at the time of the re-survey. The words of the Act are very absolute, and must, I think, be taken absolutely to restrain Government from asserting its rights in any shape oftener than once in ten years. Then looking to the words of Section 7, I find that Government is not authorized to take possession of any land which may, at any intermediate period, have been an island. Government is restricted to one kind of evidence, *viz.*, the map shewing the actual *status* at the time of re-survey. No one else is deprived of any rights which they may, in any way, have acquired in the interim. But Government is restrained from putting forward any claim to any island other than an island shewn to be an island in the new map. The Collector is, as I understand it, to compare the old map and the new map, and to take possession of any island, which, on such comparison, may appear to have been formed since the former map, subject, of course, to the claim of any other party in whom a right may have meantime vested. If another proprietor identified the island as his own land separated by a sudden irruption in the manner described in Clause 2 Section 4 Regulation XI of 1825, his right would stand good. In these cases, it is in this view clear that the lands in dispute are no islands, and that, whether they ever were islands or not, the right of Government to claim them as islands, has been prevented by Act IX of 1847. We have, therefore, only to consider these cases as between plaintiff and defendant. Now, what is their relative position? Plaintiff is the neighbouring proprietor to whose estate the new land has now adjoined itself in the manner described in Clause 3 Section 4 of Regulation XI of 1825. Defendant is, so far as we see, a mere squatter; he puts forward no title whatever, that is, he relies on none, for the plea of reformation on the site of his old lands has been abandoned by his Counsel. Either the new lands are an ordinary accretion to his estate under Clause 3 Section 4 Regulation XI of 1825; or if they ever were in any degree islands, the claim of Government having been taken off by Act IX of 1847 and not being put forward, and the lands having by the drying up of the waters or silting up of the channels became adjoined to plaintiff's lands, who is to have them, plaintiff or the squatter? It seems to me that in such a case, the island right of Government not being vested till Government can and does claim it under Act IX of 1847, if the water is fordable any time before such claim takes effect, the land is an accretion to the neighbouring proprietor under the provisions of Clause 3; and even if there were any doubt that this is so, then in all such cases I am clear that still, under Clause 5, on general grounds of equity and good conscience, the plaintiffs would have a claim far superior to that of the mere squatter. Act IX of 1847 was never meant to encourage squatters and successful occupants by force of the stronger arm. It only restrained Government; and Government being restrained, all lands not claimed by Government must go to the nearest riparian proprietor, not to the squatter. I, therefore concur in dismissing these appeals.

The 26th January 1865.

Present :

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Mortage—Money-decree—Priority—Bona fides—Lien of Mortgagee.

Case No. 1704 of 1864.

Special Appeal from a decision passed by Mr. F. Tucker, Judge of Shahabad, dated the 5th April 1864, *affirming a decision passed by the Principal Sudder Ameen of that District, dated the* 16*th September* 1863.

Mohun Ram (Plaintiff), *Appellant,*

versus

Sheo Narain Singh and others (Defendants), *Respondents.*

Messrs. R. T. Allan and *R. E. Twidale* for Appellant.

Baboo Kishen Succa Mookerjee for Respondents.

A decree-holder, having failed to enforce his lien in his original suit in consequence of having obtained only a money-decree, sued to have his lien established and given effect to. HELD that generally in such a case he would be entitled to have the rights and interests of the mortgagor as they were at the date of the mortgage, sold in satisfaction of his claim in preference to that of other mortgagees claiming under mortgages made subsequently to his mortgage. But as priority and *bonâ fides* of the respective deeds and claims required still to be enquired into below, the case was remanded accordingly.

IN this case plaintiff sues as purchaser, on the 15th of March 1862, of a decree dated the 23rd April 1857, made in favor of one Sheobut Ram. Plaintiff's claim was for sale of two-thirds of mouza Phoollhana in right of mortgage by reversal of a Miscellaneous Order of the Principal Sudder Ameen, dated 19th December 1862, and of the Judge affirming the same, dated 8th April 1863; also for exemption of property from sale in the execution case of Sheonarain Singh. Sheobut Ram's suit had been based on a mortgage bond, dated 8th April 1855, in which it was stipulated that, if a certain sum of money which had been advanced to the judgment-debtor, were not repaid by a certain date, the property mentioned in the bond should be liable for the debt.

The plaintiff's suit was decreed on the 23rd April 1857, and *the decree was,* it is admitted, *for the money* advanced by decree-holder. The plaintiff's allegation is that, when he applied for execution of the decree purchased by him as above, and for sale of the mortgaged property, the Principal Sudder Ameen ordered in the Miscellaneous Department, on the 22nd September 1862, that the defendant Sheonarain Singh's decree should be first satisfied by the sale of the mortgaged property, and *after that* plaintiff's decree should be satisfied; but that, subsequently, one Deendoyal objected, as purchaser (in execution of another decree) of the property, and upon his objection the property was released to him. Plaintiff's case then was that, as the property was hypothecated to his vendor in the mortgage bond, plaintiff, as representing the mortgagee, had the right to the property, and that no other party represented the mortgagee to whom the property was specifically hypothecated. Plaintiff sued, therefore, for possession by reversal of the sale.

Defendant Sheonarain's case was that, as holder of a decree, dated 30th June 1855, against the same judgment-debtor on a mortgage bond, dated 23rd July 1853, of *prior date* to that of plaintiff, he had a preferential claim; that he held a second decree of the 10th August 1863, confirming the original decree; that the decree held by plaintiff's vendor was only a money decree; and that, consequently, plaintiff's claim for possession of the property by reversal of the sale, should not be decreed.

When the case was first before this Court, the hearing was adjourned for the production and consideration of the terms of the respective mortgage bonds. The terms of the plaintiff's mortgage bond had been before referred to, and it is admitted by defendant that by them the property in suit was hypothecated for the money advanced. Defendant has not, however, produced his mortgage bond, but relies on the decree which recites it as the document which gives him his lien.

The question before this Court, as brought by the special appellant, is, what are the rights and the position of a decree-holder in this case, having a lien upon certain property, but having only a money-decree, with respect to that property now found in the hands of a third party.

It was unanimously held by a Full Bench on the 14th December 1864 (January, Weekly Reporter, p. 315, No. 14) that the holder of a money-decree, though having a mortgage, is in no better position than an ordinary decree-holder, and, if he require to obtain the property through his lien, must bring an action against the third party in possession,

but that he cannot execute the money-decree against the property in the hands of the subsequent purchaser.

In the present case, the plaintiff having failed to enforce his lien in his original suit in consequence of having obtained only a money-decree, now sues to have his lien established and given effect to. We think he is entitled to have the rights and interests of the mortgagor as they were at the date of the mortgage, now sold in satisfaction of his claim. He cannot have the sale which has already taken place formerly, set aside; but, of course, if, as a matter of fact, his mortgage is prior to any of the others, the sale to be made under this decree, will practically over-ride any sales which may have taken place. It seems, however, to be doubtful what the exact nature of the claims of the opposing mortgagees and decree-holder is, and this part of the case has not manifestly been properly tried or decided by the Lower Court. There must be a clear finding of what their claims respectively are, and of their several dates, in order that the question of *priority* may be settled. The *bonâ fides* and reality of *each* alleged mortgage and lien must be carefully enquired into; and the Lower Court will bear in mind that the mere admission by the mortgagor, that he has made a certain mortgage, will not be sufficient proof (by itself alone) of that mortgage, as against an opposing mortgagee who denies it and sets up a prior deed of his own. The mortgage deed must, in such case, be produced and proved or accounted for satisfactorily. The case is remanded accordingly.

The 27th January 1863.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Sale for arrears of rent not affected by prior sale of ryot's interests.

Cases Nos. 2691 and 2696 of 1864.

Special Appeal from a decision passed by Moulvie Iradut Ally Khan Bahadoor, Principal Sudder Ameen of Shahabad, dated the 21st June 1864, affirming a decision passed by the Sudder Ameen of that District, dated the 5th December 1863.

No. 2691.

Khoobaree Rai (one of the Defendants), *Appellant,*

versus

Roghoobur Rai (Plaintiff), *Respondent.*

Baboo Otcol Chunder Mookerjee for Appellant.

None for Respondent.

No. 2696.

Chutter Lal Singh (Defendant), *Appellant,*

versus

Roghoobur Rai (Plaintiff), *Respondent.*

Baboo Rajendro Nauth Bose for Appellant.

Baboo Kali Kissen Sein for Respondent.

The purchaser, at a sale in execution of a decree, of the rights and interests of the former holders of a heritable and transferable tenure, is bound by their engagements with the zemindar—among others, payment of rent. Notwithstanding the purchaser's priority of sale, the zemindar can sell the tenure for arrears of rent.

THE plaintiff in this case (special respondent before us,) sued to recover possession of 33 b. 11 c. 14 c. of land on the ground of purchase at an execution of decree sale held on the 26th December 1861, of the rights and interests of Shoodur Rai and Ram-Suhai Rai. His allegation was, that he had been opposed in his endeavour to take possession by one Khoobaree Rai, and by the zemindar, Chutter Lal Singh.

It appears from the record that Khoobaree Rai, the special appellant, purchased the tenure at a sale for arrears of rent held under Act X of 1859, on the 20th of January 1862, due to the zemindar by the ryots above named, *viz.*, Shoodur Rai and Ram Suhai.

Special respondent sued, therefore, to annul the sale, and to recover damages for the value of the produce he had been illegally kept out of from the date of his purchase in 1861.

The zemindar, defendant, Chutter Lal Singh, disclaimed all connection with the special respondent's suit; his tenants were in arrears, and he had their tenure sold according to law.

Khoobaree Rai, who is the special appellant in Case No. 2691, replied (1) that the land claimed by the special respondent was not the same as that purchased by him (special appellant) at the Act X sale; and (2) that the special respondent's purchase extended only to the rights and interests of the judgment-debtors; whereas he, as purchaser under Act X of 1859, bought the tenure itself.

Both Lower Courts found that the land claimed by the special respondent was identical with that purchased by the special appellant, and the Principal Sudder Ameen decreed the suit in favor of the former, on the ground of his prior purchase. He decreed also as damages against the zemindar, Chutter Lal Singh, the value of the produce during the time of the special respondent's dispossession.

Both defendants appeal, the purchaser under No. 2691, the zemindar under No. 2696.

And first as to the purchaser. There can, we think, be no doubt that the Principal Sudder Ameen was wrong. The first sale at which the special respondent was purchaser, was of the rights and interests of Shoodur Rai and Ram Suhai Rai, judgment-debtors. These consisted of the right of holding the tenure as a heritable and transferable one, subject to payment of certain rent to the zemindar. The now purchaser stood in the exact position of the old ryots, and, whilst he succeeded to their privileges, was bound of course by their engagements with the zemindar The first of these was the payment of rent; and as the special respondent neglected to discharge it, the zemindar was perfectly justified in bringing the provisions of Act X into operation, and selling the tenure itself.

Priority of sale in favor of the special respondent, cannot of course affect the point at issue, inasmuch as the two things sold were not one and the same.

We, therefore, reverse the decision of the Lower Appellate Court, and dismiss the claim of special respondent for recovery of possession, and for cancelment of the Act X sale.

It follows, as a matter of course, that the award of damages against the zemindar is reversed also; and special appeal No. 2696 is, therefore, decreed, and the Principal Sudder Ameen's order reversed in both cases with costs against the special respondent.

The 27th January 1865.

Present:

The Hon'ble H. V. Bayley and G. Campbell, *Judges.*

Alluvial Lands.

Cases Nos. 190, 184, 185, 187, 189, and 330 of 1864.

Regular Appeals from a decision of Baboo Grish Chunder Ghose, Additional Principal Sudder Ameen of Backergunge, dated the 29th August 1863.

No. 190.

Mr. G. P. Wise and others (Defendants), *Appellants,*

versus

Ameerunnissa Khatoon (Plaintiff), and others (Defendants), *Respondents.*

Messrs. R. V. Doyne and *R. T. Allan* and *Baboo Onoocool Chunder Mookerjee* for Appellant.

Baboos Greeja Sunker Mojoomdar, Khetternath Bose, and *Grish Chunder Chatterjee* for Respondents.

The ruling of the Lower Court, that claims under Clause 2 Section 4 Regulation XI of 1825 (*i. e.*, to lands as re-formed lands,) are superior to claims under Clauses 1 and 3 of Section 4 or under Section 5 of that Regulation reversed—Case remanded.

THESE six cases are all more or less connected with the Case No. 334, decided by us on the 10th of this month, and with Cases Nos. 186 and 188, decided by us yesterday. But each has some separate point in it, and we shall, therefore, record a separate judgment in each.

No. 190.—In this case plaintiff sues for certain chur-lands, stating in one part of her plaint that they are re-formations of her diluviated lands on their original site in the plaintiff's mehals *Koyarea* and *decreed* chur, and in another part of her plaint that "the "disputed chur is commingled (*misrit* is the "vernacular term used,) with her *decreed* "chur." The plaintiff goes on to say that "the disputed lands belong to chur *Koyarea,* "and the *decreed* chur which belong to her "zemindaree."

Defendant's case is that the disputed land diluviated from his village of Selimpore, and re-formed near his property of Sahebrampore; that he is in possession under an award made under Act IV of 1840; that, therefore, it will be on plaintiff to prove his allegation of the fact of lands in dispute having diluviated from, and re-formed on, the original site of plaintiff's *Koyarea* and *decreed* chur, and to identify them; that, as to the former village (Koyarea), the disputed land is divided from it by an unfordable stream (river Koyarea), and as to the latter, plaintiff produces no decree for the chur which he alleges was decreed to her.

An Ameen was sent out to make a local enquiry. This report is in substance that the disputed land is divided on the east

side from defendant's village of Selimpore by the unfordable stream of the Atiar Khan River; that it is divided on the south from plaintiff's village of Koyarea by the unfordable river of that name, but still does appear on that side to be re-formation after diluvion of the land of Koyarea; that on the west side it is divided from plaintiff's decreed chur by a *Mora-gunga*, or an old bed of a stream fordable at all times; and that on the north side it is divided from the decreed chur by a dhone or stream, in which in the dry season there is little water, just enough to float very small boats; but that in the rains there is much water, and it is navigable. The Ameen, in his Report, held the chur in dispute to belong to plaintiff.

The Principal Sudder Ameen decided the case in favor of plaintiff. He held that, "according to Section 4, Regulation XI of "1825, and the High Court's precedent of 11th "September 1862, Ramnath Thakoor, ap- "pellant, a claim calling lands re-formed "lands has greater weight than that calling "them to be newly alluviated lands adjoin- "ing both main lands." The Principal Sudder Ameen finds that *Koyarea* and the *decreed* chur both belong to plaintiff, and that on both sides of the River Koyarea plaintiff had lands. Then referring to the Ameen's map and report, and to the facts as to the locality of the disputed land, he considers plaintiff entitled to it as part of her zemindaree, and decrees plaintiff's suit accordingly.

Defendant appeals and urges the same pleas as were put forth in his answer. In addition, defendant states that the Ameen's report does not shew any data upon which it is based; that re-formation on the original site of lands identified as diluviated is not shewn by the plaintiff; that that, and that only was her case in the plaint, and that she cannot now vary it on the basis of the dhone to the north, and the *Mora-gunga* to the west, being fordable streams, or the land being mingled (*misrit*), *i. e.*, part of her *decreed* chur; that no decree is produced for that chur; that there is, on the Koyarea side, an unfordable stream; that the dhone to the north is not shewn to be an unfordable stream; that thus plaintiff has in no way proved her case, and the decree of the Principal Sudder Ameen in her favor is wrong, and should be reversed.

We are of opinion that this case must be remanded.

The Principal Sudder Ameen has erred in his view of the precedent of the 11th September 1862 in the case of Ramnath Thakoor.

In that case the plea at the bar in appeal was that, *under no circumstances*, could land, separated across an unfordable stream, revert to the former proprietor on the other side of the stream. It was then held by this Court that, if the identity of the land was *fully proved*, it could. But in no way did the precedent state, as the Principal Sudder Ameen has read it to state, that claims under Clause 2, Section 4 Regulation XI of 1825 were superior to claims under Clauses 1 and 3 of Section 4, or those under Section 5 of Regulation XI of 1825.

We think that plaintiff has not proved his case upon the ground of re-formation, and that the defendant also has not made out a title by re-formation.

We find by the Ameen's report and map, and by the admissions of the parties, that on the east side the land in dispute is divided from the defendant's village Selimpore (as diluviated and re-formed lands of which village defendant claims it) by the unfordable stream called Atiar Khan; that on the *south* it is divided from plaintiff's village Koyarea by the unfordable stream of that name. We next find that the Ameen does not give very clear *data* on which, and as in regard to this south side, he considers the land in dispute to be re-formed lands of Koyarea; but that he does find that on the west and north sides the lands in dispute are close on plaintiff's *decreed* chur, and are divided from it only by fordable water.

Upon this point we are met by the plea that there is no *decree* put in to shew that what plaintiff called the *decreed* chur is his. But the Ameen's report shews no such objections to have been taken on the spot, and defendant nowhere claims that *original* chur as his. We are further requested to notice appellant's objection that the plaintiff claimed the lands in suit only as re-formations of diluviated lands on their original site, *i. e.*, under Clause 2 Section 4, and not on the right given by Clause 3 as adjoining lands separated by fordable water. Certainly, plaintiff's claim in this latter view is not distinctly put in her plaint. But she does, in a passage cited before in this judgment, to some extent urge this claim also; and the state of facts shewn by the Ameen's report is clearly one which would, as to the north and east sides, put plaintiff's claim on that basis.

On the whole we think that the case should be remanded for re-trial on these issues.

1*st*.—Whether on the west side, and to what extent in a westerly direction, plaintiff

is entitled to the disputed lands under Clause 1 or Clause 3 Section 4, Regulation XI of 1825?

2nd.—Whether on the north side and to what extent in a westerly direction plaintiff is entitled to the disputed land as under Clause 1 or Clause 3 Section 4 Regulation XI of 1825.

The nearest Moonsiff will be deputed to make a report on the locality as to these issues within two months of the date of this order, and the judgment will issue at once by an English precept, requiring the Judge himself to re-try the case on these issues, and transmit the evidence, with his opinion, within three months of this date. Copies of judgments in Nos. 334, 186-188 to accompany this.

The 27th January 1865.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Hindoo Law—Son's Widow (Maintenance of).

Case No. 2603 of 1864.

Special Appeal from a decision passed by Mr. L. W. Hutchinson, Additional Principal Sudder Ameen of East Burdwan, dated the 27th May 1864, *affirming a decision of the Moonsiff of Indos, dated the 9th April* 1863.

Koodee Monee Dabea (Plaintiff), *Appellant,*

versus

Tarra Chand Chuckerbutty (Defendant), *Respondent.*

Baboos Bhoobun Chunder Banerjee and *Anund Gopal Paulit* for Appellant.

Baboos Kedar Nauth Mozoomdar and *Nil Madhub Sein* for Respondent.

According to Hindoo law, a son's widow is entitled to maintenance so long as she leads a chaste life, whether she elects to live with her father-in-law or with her own relations.

THE plaintiff in this case sued her father-in-law for maintenance.

The Principal Sudder Ameen, in deciding the case, held that as the widow professed herself willing to live in her father-in-law's house, and as the father-in-law admitted her claim so long as she remained with him, dismissed the appeal which had been preferred from the decision of the Moonsiff.

There can be no doubt we think that the Principal Sudder Ameen was wrong. A son's widow is, according to Hindoo Law (Vyavasta Durpana, p. 319, No. 160), entitled to maintenance so long as she leads a chaste life, whether she elects to live with her father-in-law or with her own relations.

She, in this appeal, explains her admission to the Principal Sudder Ameen in this way —she professes herself willing to remain in her father-in-law's premises if she is allowed a separate room to herself. This is not such an admission as noticed by the Principal Sudder Ameen.

But in any case she is absolutely entitled to maintenance whenever she may choose to take it, so long as she leads a chaste life.

The case will, therefore, go back for the lower Court to assess the rate of maintenance with reference to the father-in-law's means.

We are compelled to observe in conclusion that the lower Appellate Court's judgment is to the last decree insufficient and unsatisfactory.

The 27th January 1865.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Small Cause Courts (Jurisdiction of)—No Special Appeal.

Case No. 2571 of 1864.

Special Appeal from a decision passed by Mr. C. Hobhouse, Judge of Midnapore, dated the 8th June 1864, *reversing a decision of the Sudder Moonsiff of that District, dated the 18th January* 1864.

Joynarain Manjee (Defendants), *Apellant,*

versus

Muddoosoodun Gorait (Plaintiff), *Respondent.*

Baboo Omesh Chunder Banerjee for Appellant.

Baboos Luckhee Churn Bose, and *Kishen Succa Mookerjee* for Respondent.

A suit to recover from the defendant rupees 235 paid to him in excess of his share of the profits of certain lands, is cognizable in the Small Cause Court, and, consequently, no special appeal will lie in such a case under Section 27 Act XXIII of 1861.

NO special appeal will lie in this case because the suit falls within the terms of Section 27 of Act XXIII of 1861. The suit is brought by the plaintiff to recover from the defendant rupees 235 paid to him in excess of his share of the profits of certain lands. The plaintiff's case is that he and

the defendant were jointly entitled to the profits of the land, and that the defendant has got Rupees 235 more than his share. He therefore sued to recover this sum and got a decree. Such a suit was clearly cognizable in the Small Cause Court, and consequently no special appeal lies from the decision which has been passed. The appeal is dismissed with costs.

The 27th January 1865.

Present :

The Hon'ble C. Steer and E. Jackson, *Judges.*

Resumption—Presumption of Lahheraj before 1790.

Case No. 2574 of 1864.

Special Appeal from a decision passed by Baboo Sreenath Bidyabagish, Principal Sudder Ameen of East Burdwan, dated the 8th June 1864, *affirming a decision of Moulvie Abdoor Rawoof, Moonsiff of Culna, dated the 28th April* 1863.

Heera Monee Dabea (Plaintiff), *Appellant,*

versus

Lokenath Mundul and others (Defendants), *Respondents.*

Baboo Gopeenauth Mookerjee for Appellant.

Baboo Umbica Churn Banerjee for Respondents.

In a suit for resumption where the defendant gives direct evidence of possession for a period only a few years short of 1790, it is competent to the Court to infer from collateral facts and other evidence a possesion prior to that period.

THIS is a resumption suit. It was held by the first Court that the defendant had proved that he had held the lands as lakheraj from a period prior to 1790, and so that Court declared the suit of the plaintiff barred.

The Principal Sudder Ameen, without saying anything as to the law of limitation, fully acquiesces in the finding of the first Court, and confirms the judgment.

It is urged in special appeal that none of the documents referred to carry the defendant's possession so far back as 1790, and, therefore, there was no adequate evidence to support the finding.

We think that, where, as in this case, the defendant holds evidence of possession to a period only a few years short of 1790, it is competent to the Court to infer from collateral facts and other evidence a possession prior to that period. Such presumptions, if well founded, are evidence; and we have no reason to think that the presumptions were otherwise than well founded. The fact then of possession from prior to 1790 being proved, the plaintiff is clearly barred, as he is not an auction-purchaser within 12 years from the date of suit, and the judgments are correct.

The special appeal is accordingly dismissed with costs.

The 27th January 1865.

Present :

The Hon'ble C. Steer and E. Jackson, *Judges.*

Waste lands—Possession—Limitation.

Case No. 2565 of 1864.

Special Appeal from a decision passed by Baboo Opendro Chunder Nyarutno Bahadoor, Principal Sudder Ameen of Furreedpore, dated the 20th June 1864, *affirming a decision passed by the Moonsiff of Dacca, dated the 18th December* 1861.

Eshan Chunder Rai and others (Plaintiffs), *Appellants,*

versus

Kali Coomar Rai and others (Defendants) *Respondents.*

Baboos Romesh Chunder Mitter and *Chunder Madhub Ghose* for Appellants.

Baboos Mohinee Mohun Roy, Kally Mohun Doss and *Onoocool Chuhder Mookerjee* for Respondents.

Jungle lands may yet be in the possession of some one. Where limitation is pleaded, the plaintiffs' cause of action must be deemed to commence from the date when adverse possession was taken.

THE question to be decided in this case is whether the lands in suit belong to the plaintiff's estate or to the defendants. On a former occasion the Principal Sudder Ameen found the issue in favor of the plaintiff upon proof of his title.

The High Court remanded the case that the Principal Sudder Ameen might try the question of limitation. This has now been done; and the Principal Sudder Ameen's decision is that, because the report of the Ameen shows that the land in dispute has been laying waste for 40 or 50 years, it has

not been in the possession of the plaintiff, and his suit is barred.

The conclusion upon the above finding is not warranted, for though the land may be a jungle, it may still be in the possession of some one.

The fact, however, is that this jungle has not been in the possession of either the plaintiff or defendant, as ascertained by the local Ameen, whose report we have no reason to doubt. The question then is: Is the plaintiff's suit barred?

The plaintiff is certainly not barred by any adverse possession; and inasmuch as, until there was adverse possession, there was no cause of action, the suit is not barred unless the suit has not been brought within 12 years from the date when adverse possession was taken. This was the plaintiff's cause of action; and as from the Ameen's report it is clear that no acts of ownership were exercised by either party in respect to the land, the subject of this litigation, until a very recent period preceding institution of this suit, there is no ground for holding that the plaintiff's remedy is lost by his failure to sue within 12 years from the date of his cause of action. The title then having been already found on reliable evidence to be with the plaintiff, and his suit not being barred on the ground of limitation, we must set aside the second decision of the Principal Sudder Ameen, holding that limitation has been incurred, and restore the first decision which found the title to be with the plaintiff. The defendant will pay all the costs of suit from first to last.

The 27th January 1865.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Small Cause Courts (Jurisdiction of)—No Special Appeal.

Case No. 2572 of 1864.

Special Appeal from a decision passed by Mr T. Sandys, Judge of Dinagepore, dated the 3rd June 1864, *modifying a decision passed by the Moonsiff of Hemtabad, dated the 18th March* 1864.

Kenoo Mundul and Dookeah Sircar (Defendants), *Appellants,*

versus

Mohwa Mahomed (Plaintiff), *Respondent.*

Baboo Omesh Chunder Banerjee for Appellants.

Baboo Anundgopal Paleet for *Respondent.*

No special appeal lies in suits for damages under 500 Rupees cognizable in the Small Cause Court.

A PRELIMINARY objection has been taken by the special respondent, who contends that no appeal will lie to this Court.

We find that the suit was one for damages; it was cognizable in the Small Cause Court, the sum claimed being under 500 Rupees, (Section 3 Act XLII of 1860). There being no Small Cause Court in the zillah, it was brought in the Moonsiff's Court, and one appeal only would lie, either to the Judge or the Principal Sudder Ameen. No special appeal is allowed in suits of this nature (*Vide* Section 27 Act XXIII of 1861).

The appeal is dismissed with costs and interest.

The 27th January 1865.

Present:

The Hon'ble H. V. Bayley, and G. Campbell, *Judges.*

Government Farmers—Recusancy of Settlement—Duration of such farms.

Cases No. 330 of 1863 and Nos. 187 and 189 of 1864.

Regular Appeals from decisions passed by Baboo Greesh Chunder Ghose, Principal Sudder Ameen of Backergunge, dated respectively the 30th March 1863 and 30*th March* 1864.

Ameeroonissa Khatoon (Defendant), *Appellant,*

versus

Moulvie Abdool Ali (Plaintiff), and others (Defendants), *Respondents.*

Baboos Chunder Madhub Ghose, Kishen Succa Mookerjee, and *Greeja Sunkur Mojoomdar* for Appellant.

Mr. R. T. Allan, and *Baboos Dwarkanath Mitter, Unnoda Pershad Banerjee, Hem Chunder Banerjee, Kalee Mohun Doss,* and *Onookool Chunder Mookerjee* for Respondents.

Suit laid at Rupees 5,800.

In cases of recusancy of settlement, the farm made by Government on account of that recusancy will be maintained pending the period, and to the extent of the farm, notwithstanding proprietary right may be disputed or decided in the Courts.

THESE three appeals may conveniently be decided together, and are connected with cases* No. 334, decided 10th January, and Nos. 186, 188, 190, 184, and 185, decided this day.

* See *Ante* Vol. II, pages 34 and 132.

In No. 187, Moulvie Abdool Ali was plaintiff, and Musst. Ameeroonissa defendant. The defendant appeals, urging that plaintiff has got a decree for the disputed chur lands in this case; but that, as defendant held 8 annas as *proprietor* and 8 annas as *farmer*, the decree should not entitle plaintiff to possession before the expiry of the terms of the 20 years' farm from Government, which has 3 or 4 years more to run, *i. e.*, from 1255 till 1275 B. S.

We do not think that in this case the decree ought, in any way, to interfere with the rights of defendant, appellant, as Government farmer, for the period of, and to the extent of his interest in the farm.

We decree this appeal to this extent accordingly, with costs of the appeal here payable to appellant.

No. 189. This case will be decided upon the same principle as the preceding. Here Bykunt Nath Chatterjee sued Ameeroonissa for an 8 annas share of the disputed lands, and got a decree. But Ameeroonissa, in appeal, urges that possession should not pass to plaintiff under the decree till the expiry of her farm from Government.

We think this appeal should also be decreed for the period of, and to the extent of the appellant's farm, and we decree accordingly with costs of this appeal payable to appellant.

No. 330. This was a suit originally brought by Ameeroonissa as plaintiff against Wise; but Bykunt Nath intervened and was made a defendant, and pleaded that Ameeroonissa, plaintiff, had no right to *settlement at all.* In that suit, Bykunt Nath also stated (page 18), that he had brought a regular suit against Ameeroonissa on the above ground. That regular suit was decided against Bykunt Nath, and he appealed to this Court in No. 41 of 1863. We then decided that "though defendant, *i. e.*, Ameeroonissa, "as farmer, may have possession of the land, "plaintiff, who receives *malikana* for his "share of original chur, will not be prejudiced as to the proprietary title in such "portions of the more recent accretions as "adjoin his portion of the chur, whenever "the Collector may take action under Act "IX of 1847 to settle the land." With this modification we dismissed the appeal of Bykunt Nath. A review was, however, admitted; and upon that review there was a difference of opinion, which rendered a reference to a third Judge necessary. The decision on that reference has not been yet given. And No. 330 was kept back to follow the result on that reference; but the *only point* now before us in that No. 330, is one as to which we do not see any necessity for further delay in deciding No. 330, and we have called for, and heard the case accordingly.

The point in No. 330 before us in appeal is simply whether Ameeroonissa's possession as Government farmer should be disturbed in case of Bykunt Nath getting a final decree for settlement with him as proprietor, for the remaining period of the Government farm? We are of opinion that the claim of proprietary right in cases of recusancy of settlement, cannot interfere with the farm made with another party on account of that recusancy, pending the period, and to the extent of the farm; and that unless it be decided that Ameeroonissa has no right to the farm, which she holds from Government, to which effect there is as yet no decision before us, Ameeroonissa cannot be dispossessed of the farm till the expiry of such term.

We accordingly decree this appeal to this extent with costs.

The 28th January 1865.

Present:

The Hon'ble C. Steer and E. Jackson *Judges.*

Suit for possession and mesne profits (by ryot relinquishing his lands).

Case No. 2562 of 1864,

Special appeal from a decision passed by Pundit Sreenauth Bidyabaghish, Principal Sudder Ameen of East Burdwan, dated the 18th July 1864, *modifying a decision passed by the Moonsiff of that District, dated the 9th June* 1863.

Shoodan Kurmokar (Defendant), *Appellant.*

versus

Ram Churn Pal (Plaintiff), *Respondent.*

Baboo Gopeenauth Mookerjee for Appellant.

Baboo Obhoy Churn Bose for Respondent.

The plaintiff by leaving his lands, and making no provision as to their management or the payment of his rents, put an end to the contract between him and the zemindar, who was, therefore, competent to put in another ryot. Under such circumstances it was held that no action would lie against the new ryot for mesne profits, nor, in the absence of the zemindar, could the plaintiff's suit to recover possession of his lapsed rights, lie.

THIS was a suit to recover possession of a jote. The allegation is that the plaintiff

left his jote for the years 1260 and 1261 in charge of one Sham Kurmokar; that the plaintiff returned in 1262, but was dispossessed by the defendant. The plaintiff now sues for possession and mesne profits from 1262 to 1268. The defendant's answer is that the plaintiff left his jote with Sham Kurmokar for 1260 and 1261, but did not return in 1262; and that the zemindar then gave the jote to the defendant, who has cultivated it, and paid rent for it from that time to the present.

The Moonsiff of Khytee has decreed the claim. The main point at issue between the parties, *viz.*, whether the plaintiff returned in 1862 and claimed the jote and offered to pay its rent, is not alluded to in the judgment. Indeed, it is clear that the plaintiff took no measures then to recover his jote, and that he has paid no rent for it from 1262 to 1268. But the Moonsiff finds that, as the plaintiff was in possession in 1261 and the defendant was in possession in 1262, consequently the defendant dispossessed the plaintiff. The Moonsiff admits the zemindar's jumma-wasil-bakee papers to be evidence of the plaintiff's possession in former years, but refuses to admit those papers as evidence of the defendant having held possession under a lease from the zemindar and having paid rent to him, because they are not attested. The Principal Sudder Ameen, Pundit Sreenauth Bidyabagish, confirms the Moonsiff's decree for possession as well as six years' mesne profits without adverting in any way to the real facts in dispute between the parties, showing, however, in the few words which his judgment does contain, that he had not even made himself acquainted with the answer of the defendant, as he stated that the defendant had not been able to prove that he was the plaintiff's *koorfa* ryot.

In special appeal, the mistake of the Principal Sudder Ameen is pointed out. But we think that the plaintiff's case cannot stand. It is quite clear, on plaintiff's own showing, that it was the zemindar who turned him out of his jote. The evidence adduced by him, *viz.*, the zemindaree papers, prove this. The defendant took possession under an arrangement with the zemindar. The plaintiff's suit, therefore, on this cause of action will be against the zemindar under Act X of 1859, and not against the ryot. The plaintiff left his lands, making no provision as to their management, or the payment of the rent after 1261. He, by that act, put an end to the contract between him and the zemindar, and the zemiedar may put in a new man. No action will, under such circumstances, lie against the new ryot for mesne profits; nor, in the absence of the zemindar, can the plaintiff's suit to recover possession of his lapsed rights, lie.

We reverse the judgments of the Lower Courts, and dismiss the plaintiff's suit with all costs of all the Courts.

The 28th January 1865.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Grants by Putneedar not in possession—Right of Grantee to raise question of Grantor's title.

Case No. 2194 of 1864.

Special Appeal from a decision passed by Pundit Tarakant Bidyasagur, Principal Sudder Ameen of Jessore, dated the 7th May 1864, *reversing a decision passed by the Moonsiff of that District, dated the 8th August* 1862.

Dinomonee Banerjee (Plaintiff), *Appellant;*

versus

Gyrutoolah Khan and others (Defendants), *Respondents.*

Baboo Motee Loll Mookerjee for Appellant.

Baboos Juggadanund Mookerjee and Kalee Kissen Sein and *Moulvie Syed Murhamut Hossein* for Respondents.

It is not competent to a superior holder like a putneedar, by the grant of that which is not in his possession, to give opportunity to a party to raise the question of his title and have it indirectly decided.

PLAINTIFF, special appellant, sued the defendant for possession of certain lands covered by a mourosee pottah of his within the putnee talook belonging to the Meergunge Factory.

Defendant denies the plaintiff's claim, alleging that the land belongs to him.

The Lower Appellate Court dismissed plaintiff's claim, finding it not to be proved to it's satisfaction that the grantor was in possession at the time of the alleged lease to the plaintiff; that, consequently, plaintiff's suit was untenable, and must be dismissed.

Plaintiff now appeals specially, urging that the decision of the Principal Sudder Ameen on the above point was erroneous in point of law, and that whether his grantor was in possession as putneedar or not of the

lands covered by the grant, the grant to him should have been enquired into fully.

We think the ruling of the Court below is quite correct, and that it is not competent to a superior holder like a putneedar, by the grant of that which is not in his possession, to give opportunity to a party to raise the question of his title, and have it indirectly decided. In order to enable a lessee to defend any action, his grantor must be in possession at the time of the grant, otherwise a suit for possession at the tenant's instance alone cannot be supported. We reject the special appeal with costs.

The 14th January 1865.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Sale of Goverment rights as zemindar (not to affect existence of under-tenures sold for arrears of rent).

Case No. 1969 of 1864.

Special Appeal from a decision passed by Mr. F. J. Cockburn, Additional Judge of Backergunge, dated the 7th May 1864, *reversing a decision passed by the Moonsiff of that District, dated the* 30*th June* 1863.

Goluck Chunder Sein (Plaintiff), *Appellant,*

versus

The Collector of Backergunge (Defendant), *Respondent.*

Baboos Kalee Mohun Doss and *Hem Chunder Banerjee* for Appellant.

Baboo Kishen Kishore Ghose for Respondent.

The Government having once sold a shikmee talook for arrears of rent under Act VIII of 1835, and the parties under whom the plaintiff claims, having purchased the same and not having directly disclaimed all rights in the tenure,—HELD that the Government cannot afterwards, sell its zemindary rights in the tolook as a khas mehal, thus ignoring the existence of the under-tenure. Any sale of the Government rights must be subject to the existence of the under-tenure.

PLAINTIFF sues for the confirmation of his right to a shikmee talook, and for a declaration that, at the sale of the Government right as zemindar to the rents, the zemindar cannot interfere with its existence as an under-tenure.

The Government denies the existence of the shikmee talook.

The Lower Court gave plaintiff a decree; and the Lower Appellate Court reversed the judgment of the first Court, dismissing the plaintiff's claim.

Plaintiff now appeals specially, urging that, irrespective of other documents showing clearly his title, the Government has itself, by selling the tenure for arrears of rent, recognised its existence; that, having once by such recognition, guaranteed its existence to purchasers, it cannot now turn round and ignore the existence of that which it has once guaranteed.

Government is zemindar of Bozurgoomedpore, and has been so for years past, and has, during that period, sold the shikmee talook which plaintiff claims, to parties from whom the title of plaintiff is derived, for arrears of rent under Act VIII of 1835. Government subsequently, being anxious of selling its zemindaree rights, sells its rights in the talook as a khas mehal, ignoring also the under-tenure of plaintiff.

This, we think, Government cannot do. Government having once put up for sale the tenure, and parties having purchased the same, and they not having directly disclaimed all rights in the tenure, the tenure must be held to exist, and Government not to be in a position to ignore it. Were Government allowed so to act, it would amount to a breach of good faith to those who, on the guarantee of Government the zemindar, purchased the tenure at a sale for arrears of rent. Under this view, we declare that any sale of the Government rights in the talook is made subject to the existence of the under-tenure of the plaintiff. This judgment, in no way, interferes with the right of Goverment, or a purchaser of Government rights at a sale to assess the talook according to the laws in force applicable to the property. The special appeal is decreed with costs.

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APPELLATE HIGH COURT.

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The 30th January 1865.

Present:

The Hon'ble George Loch and W. S. Seton-Karr, *Judges.*

Regular Appeals from a decision passed by the Judge of Rajshahye, dated the 30th May 1863.

English Doctrine of advancement (Applicability of, to India)—Benamee(Allegation of)—Status of Daughter—Character of Father as Trustee.

Case No. 342 of 1864.

Kishen Koomar Moitro (Defendant), *Appellant,*

versus

Mrs. M. S. Stevenson and others (Plaintiffs and Defendants), *Respondents.*

Mr. R. T. Allan and *Baboo Kishen Kishore Ghose* for Appellant.

Messrs. R. V. Doyne, G. C. Paul, and *F. J. Fergusson,* and *Baboo Mohinee Mohun Roy* for Respondents.

Case No. 343 of 1864.

Hurrosoondery Dabee and another (Defendants), *Appellants,*

versus

Mrs. M. S. Stevenson and others (Plaintiffs and Defendants), *Respondents.*

Baboo Kishen Kishore Ghose for Appellants.

Suit laid at Rupees 1,40,948-0-0.

The English Doctrine of advancement is applicable in this country as between a father and daughter, both of English extraction and living under English law. The *status* of the daughter, under an alleged *bonâ fide* purchase made by her father for her advancement when a minor, cannot be set aside except by clear and positive proof that the father merely made use of her name as he would that of any servant or stranger, retaining the beneficial interest in the property for himself. The subsequent sale of the property by the father acting as guardian and trustee for the minor, does not divest him of his character as trustee, or itself prove that the purchase in the name of the minor was not *bonâ fide.*

THE suit is for the possession, with mesne profits, of the putnee talook Zillah Sewal, including Dehee. Hurnee, Hizlee, exclusive of Digapatty, Sedoogram, Islabaree and Bhatparah.

The history of this case as laid before us, is as follows:—Ishur Chunder Moostuffy the zemindar on the one part, and Jadub Anundo Baugchee and Bykant Bose for Mr. Henry Gloster French on the other part, excuted a *byenamah* on 13th Bhadun of 1253 B. S. (28th August 1846) by which the said Moostuffy, in consideration of the sum of Rupees 29,625, agreed to give the Zillah Sewal as above described in putnee to Mr. French at a jumma of Rupees 10,850. The deed acknowledges the receipt of rupees 3,000 as earnest-money and lays down the conditions for the payment of the remainder of the purchase-money. Finding that the assets of the estate were not so large as he supposed, Mr. French subsequently obtained a deduction of rupees 3,000 in the purchase-money and Rupees 400 in the annual rent, and on 23rd Aughran 1253 (7th December 1846) Ishur Moostuffy executed a bill of sale (kobala) or lease of the putnee and an *ekrar* in favor of the plaintiff, then Miss French, a minor, under the guardianship of her father, Mr. Henry Gloster French, by which he agreed to give her the putnee at a jumma of Rupees 10,450 for the sum of Rupees 26,625, which sum the said deed sets forth to have been paid to and received

by the zemindar. A *kubooleut* was executed by Mr. French, as guardian and trustee of the plaintiff, his minor daughter, on the same day as the lease, and a separate receipt of that date for the purchase-money was given by the zemindar to Miss French. All these deeds were registered on 17th December 1846. In his evidence taken before the Judge of the 24-Pergunnahs on the 26th of August 1863, Mr. French stated that the payment of the purchase-money was made in the following manner: Rupees 15,500 belonged to his daughter, being a sum given her by her grandfather and cousin Gilson Rowe; rupees 3,000 were borrowed and paid by French; and for the balance of Rupees 8,000 he gave a bond to the Moostuffy, assigning as security a moiety of the putnee. On attempting to take possession, Mr. French was opposed; as it is alleged, by Madhub Chunder Sandyal, husband of the defendants Hurrosoondery and Surnomoye, who set up a counter-lease from Ishur Moostuffy to the defendant Kishen Koomar Moitro. Unable to get possession, Mr. French sold the putnee to Mr. C. Abbott, who, as shewn by the proceeding of the Magistrate, 17th September 1852, tried in vain to get possession; and on the death of that gentleman, the trustees for his children sold the putnee to Messrs. Watson & Co., who, on 8th September 1855, instituted a suit to obtain possession of the putnee, making the widows of Madhub Chunder Sandyal with Kishen Koomar Moitro and others, defendants. A legal objection to the plaintiff's title was taken by Kishen Koomar, that as the putnee was from plaintiff's own showing, the property of a minor, her father, French, had no authority to sell it; and the Judge, considering that this flaw in the title was sufficient to invalidate the plaintiff's right, dismissed the suit on 28th June 1858, and the plaintiff preferred no appeal. Further we find that Ishur Chunder Moostuffy transferred the bond for Rupees 8,000, which he had received from French, to Baranassee Banerjee, who brought a suit against French for the amount and obtained a decree against him personally on 12th June 1855. An appeal was preferred to the Sudder Court, and on 5th March 1857, (page 332 of the Sudder Reports) the Court with the consent of the parties, directed that the property pledged by French as guardian and trustee for his daughter as security for the debt, should first be sold, and for any balance the decree-holder might go against any other property possessed by French.

At this stage of the case, the appellants, with the permission of the Court, were allowed to file an exhibit which had been rejected as useless and out of time by the Judge. This exhibit consists of authenticated copies of a petition presented by the decree-holder for the sale of the property pledged, a petition filed by Kishen Koomar objecting to the sale on the ground that the property was part of his putnee and in his possession, and the order of the Court executing the decree dated the 2nd of September 1859 releasing the property as proved to be in the possession of Kishen Koomar. The plaintiff throughout alleges that Kishen Koomar is not the real putneedar, nor the party in actual possession, but holds benamee for Madhub Chunder Sandyal, who during his lifetime held possession and is now represented by his widows Hurrosoondery and Surnoomoye who are the parties actually in possession.

The case of the defendant Kishen Koomar Moitro, as gathered from the pleadings and documents in the record, is that Ishur Chunder Moostuffy granted him a farming lease of Zillah Sewal for 9 years from 1250 to 1258 B. S.; that in 1252 the Moostuffy, in consideration of Rupees 23,000, gave him a putnee of the property, but for some fraudulent purpose failed to deliver the putnee lease to him; and, consequently, he brought a suit in 1846 to substantiate his putnee title, and to recover the *kubala* or lease from Ishur Chunder. His suit was dismissed on 28th June 1848, and the judgment of the Lower Court was confirmed in appeal by the Sudder Court on 30th April 1850. Kishen Koomar then filed a petition of appeal to the Privy Council; but before the translations had been made, he and Ishur Chunder Moostuffy came to terms and filed a *razeenamah* and *suffeenamah* under which the appeal was struck off the file on the 3rd February 1851. In the *suffeenamah*, which is dated the 11th of January 1851, Ishur Moostuffy acknowledged having executed the *kubala* to Kishen Koomar and to having received the consideration (which latter fact he had denied in his answer in the suit), and adds that as Kishen Koomar had appealed to the Privy Council, and it was impossible to reply to the appeal, and if the decision went against him, he should be ruined, he, for these reasons, thought it advisible to file a compromise. It is further urged for the defendants that this property was attached by the Sheriff of the Supreme Court on 9th October 1846, in execution of a decree held by Doorga

Churn Dutt against Ishur Moostuffy; that it was ultimately sold to satisfy that decree on 31st July 1851, and purchased at the Sheriff's sale by Rooknee Debya, mother of Madhub Chunder Sandyal, who transferred it by deed of gift to Hurrosoondery her daughter-in-law and wife of Madhub Chunder; that, on the purchase of the zemindaree by Rooknee Debya, the Defendant Kishen Koomar applied to her for a confirmation of his title as putneedar, which request she acceded to, and he has always held undisturbed possession, paying his rent to the zemindar now represented by Hurrosoondery and Surnomoye the widows of Madhub Chunder; that, as the estate of Ishur Moostuffy was attached on 9th October 1849, the subsequent creation by him of the putnee in favor of the plaintiff on 23rd Aughran 1223, or 7th December 1846 of the same year, was altogether illegal and invalid.

The other defendants Hurrosoondery and Surnomoye support the putnee title set up by the co-defendant Kishen Koomar; declare that the putnee mehal is *bonâ fide* in his possession; that they are mere zemindars and only receive the rents, and, therefore, cannot be held liable for mesne profits or costs of suit inasmuch as they have done nothing to keep the plaintiff out of possession.

The Judge, on 30th May 1864, gave a decree in favor of plaintiff, awarding her possession with mesne profits from 1258 (1851) to be recovered from Hurrosoondery, Surnomoye, and Kishen Koomar Moitro; and fron this decision, the appeals noted above have been filed, and a third appeal is also brought by the plaintiff, Mrs. Stevenson, formerly Miss French, against so much of the judgment of the Lower Court as refused her mesne profits from a date antecedent to 1258 (1851).

The objections taken in appeal by the defendants come under two heads: (1) Limitation general and special, and (2) Failure of plaintiff to prove her title; and a third head arises from the appeal of Hurrosondery in regard to the mesne profits, *viz.*, from what date or whether any mesne profits should be awarded against the defendants? We think the contention between the parties may be disposed of under the following issues:—

1*st.*—Whether the putnee leases pleaded by plaintiff is merely a *benamee* transaction, the beneficial interest of which is in Mr. H. G. French, or was it a *bonâ fide* purchase by Mr. French for the advancement of his daughter, the plaintiff, then a minor?

2*nd.*—If the plaintiff's suit be not barred by limitation, either general or special, has she proved the validity of her title?

3*rd.*—Whether the *razeenamah* and *suffeenamah* filed by Kishen Koomar Moitro, and Ishur Chunder Moostuffy, respectively, and admitted by the late Sudder Court on the 5th February 1851, got rid of the effect of the judgment of the first Court dated 28th June 1848, and of the Sudder Court dated 30th April 1850, adverse to the validity of the putnee title of Kishen Koomar?

4*th.*—Whether Kishen Koomar is in *bonâ fide* possession from the date of his farming lease and under his putnee lease; or whether Madhub Chunder Sandyal, and after him Hurrosondery and Surnomoye, held actual possession?

5*th.*—Whether Hurrosondery and Surnomoye can be held liable for mesne profits; and, if so, whether plaintiff is entitled to mesne profits from the date of her putnee lease or from date of suit?

The first issue we have drawn up indicates the nature of the contest between the parties. The appellants urge that the acts of Mr. French clearly shew that the purchase of this putnee in the name of his daughter, was merely a *benamee* transaction; that he always treated the property as his own, and it is only in the eleventh hour that the English Doctrine of Advancement has been brought forward under which the plaintiff, when every other means for getting possession had failed, seeks to support an invalid title; that, if the Doctrine of Advancement be admitted into this case, it will be importing English Law into the Mofussil, which our Courts have hitherto strictly guarded against, and will make the defendants, who are Hindoos, liable to a law of which they knew nothing and which is not applicable to this transaction; that, as the defendants are Hindoos, the only law applicable for the trial of the suit is that of equity and good conscience as prescribed in the latter part of Section 8, Regulation VII. of 1832.

Now the real question between the plaintiff and defendant is, which of them has the preferential title to the putnee? That of the defendant has been declared by the Principal Sudder Ameen and Sudder Court in the judgments of 28th June 1848 and 30th April 1850, to be invalid; but it is urged that the effect of these decisions, adverse to defendants, has been got over by a subsequent arrangement between the parties to that suit. The real question then be-

tween the parties before us will not be tried by importing English Law, but by the ordinary rules of evidence common to all Courts. Now, though we see from the evidence before us that French has apparently treated this property as his own, yet, before we can apply the law of limitation, as we are asked to do, we must ascertain whether there be, as between French and plaintiff, father and daughter, any law under which they live and their transactions are regulated, which will protect the interests of the latter, notwithstanding the acts of the former, and prevent the operation of the law of limitation pleaded by third parties. It is admitted that if the Doctrine of Advancement be admissible, the plea of limitation falls. As between the father and daughter, both of English extraction, and living under the English Law why should it not be considered applicable? If by English law certain rights are secured to a child by the Doctrine of Advancement, why should the child, by living with its parent in this country, be deprived of that right and be put in any worse position then it would be if in England, or where English law is wholly administered? Had litigation arisen between French and his daughter, that would have been governed by English Law, and the Doctrine of Advancement might have been effectually pleaded by the daughter under the decisions of the English Courts, had French tried to prove that the putnee lease he had taken in his daughter's name, was a *benamee* transaction. We think, therefore, that, as between French and his daughter, the Doctrine of Advancement will apply, and that defendants are not in a position to call the plaintiff's *status* in question, except they are able to show by clear and positive proof that French merely made use of her name as he would that of any servant or stranger, retaining the beneficial interest in the property for himself. Now, it is urged that as French, on the day that he got the lease, pledged half of the putnee as security for the balance of Rupees 8,000 due to the zemindar, this act clearly indicated that he considered the property to be his own. But the decision of the Sudder Court on 5th March 1857, page 333, shews that in this transaction, he was acting as guardian and trustee for the minor; and he appears to have pledged the moiety of the estate as the best means of making up the purchase-money with a view to his daughter's interest. It is true that he subsequently sold the property to Abbott, but even then he called himself the guardian and trustee of the minor; and though by that act he may be considered to have violated his trust, yet he never divested himself of the character he had once assumed as trustee, and this character he preserved throughout the whole course of litigation, intervening in that capacity in the suit brought by Kishen Koomar against Ishur Moostuffy, and bearing that name in every document except the first *byenamah*, dated 28th August 1846, which was executed in the name of his two servants.

The mode in which this *byenamah* is drawn up, certainly favors the contention of the appellant that, when French first entered into treaty for the property, he had an intention of providing for his daughter. Be that as it may, he was at liberty to change his mind between the 28th August 1846 and 17th December of the same year, and probably did so. He may have thought in the interval that it might be a good investment for his daughter, and for this reason directed the *kubala* to be drawn up in her name. Now, it is not shown us that, at the time when this putnee lease was taken, French was pressed for debt, or that he had any other object in taking it in his daughter's name than what he himself deposes to. It is said that, even if the Doctrine of Advancement be admitted as applicable to such cases, yet, by French's own showing, it is not applicable to the present case, for he says that Rupees 15,500, belonged to the child: that he advanced Rupees 3,000; and that for the balance he gave a bond secured by a lien on the half of the estate, which bond has not been liquidated to the present time. Accepting the statement made by French, it does not advance the defendant's case a step, for even if half the purchase-money belonged to the plaintiff then a minor, and the rest was paid or secured by her father, her right to the property is in no wise shaken but rather confirmed the more strongly, for the purchase-money was made up, partly of her own money and partly of an advance from the father. It is said that, if the property belonged to his daughter, why did French allow so long a time to elapse without bringing a suit for possession which he might have done as trustee? But it is shown us that the contention between Kishen Koomar and Ishur Moostuffy lasted from 1846 to 1851 and was at last settled by compromise; that though French had been declared in the Principal Sudder Ameen's decision to be the putneedar, he could not, under that expression of opinion, take possession as if he had obtained a de-

cree; that finding it impossible to get possession without further litigation, he thought it advisable for his daughter's interests to sell the property, and, having parted with the title-deeds, he was no longer in a position to bring a suit. We may add that the decision of the Judge of 28th June 1858 in the suit brought by Watson & Co. to get possession of this property, proves two things which have not been set aside by any subsequent decision—that the property was the property of the minor, and as such, that French had no power to sell it—that in that litigation, to which the present defendants were parties, there was no assertion of a *benamee* transaction, nor any thing to lead the Court to think otherwise than that the putnee was purchased as a provision for Miss French. Looking therefore, at all the evidence placed before us, though we find that French did sell the property to Abbott as if it were his own, he at the same time acknowledged himself to to be acting as trustee for the child, and we have no evidence of a reliable character to convince us that the purchase in his daughter's name was otherwise than what he on oath deposes it to have been, *viz.*, "a purchase made in good faith and for has daughter's benefit." Considering, therefore, that the property did not belong to French but to his daughter, we think that the Statute of Limitation cannot be applied.

We come next to the question whether the plaintiff has proved her title or not? Two objections are taken; 1*st*, that there is no proof of the payment of consideration, and 2*nd*, that the plaintiff's purchase is invalid, having been made after the property was attached by the Sheriff. With regard to the payment of the purchase-money, we may safely put aside all the native evidence as deserving of little credit. But we have, besides the evidence of Mr. French to the payment of the money, the receipt of the zemindar for the money, and the admission by Ishur Moostuffy in his replication in the suit of Kishen Koomar that he had received the money and executed the kubala in the plaintiff's favor. It is objected to French's evidence that the Judge has accepted it unsupported by other testimony; that he should have produced his accounts, which he failed to do. But the fault, if any, does not lie with the Judge but with the parties who, when they had French in the witness box, failed to cross-examine him, and never required him to produce his accounts. They appear to have accepted his statements without making any endeavour to test their accuracy. Further, in the suit brought by Watson & Co. in 1855, Mohesh Chunder Moostuffy, the grandson of Ishur Moostuffy, who was made a defendant, as representing Ishur, stated, in his answer, that his grandfather had given the putnee to French for a consideration of Rupees 26,265, and in that statement he fully acknowledges the purchase of French, and repudiates the claim of Kishen Koomar. Since 1855 a new light has penetrated his mind; and being made a defendant in this case, he has found it convenient to side with Kishen Koomar, and to repudiate his former statement.

Then as to the purchase by French being invalid, because it was made after the property had been attached by the Supreme Court, we find that this allegation is not borne out by the facts. It is true that the order of the Supreme Court commanding the seizure, was passed on 9th October 1846, but no seizure took place till 1847, after Mr. Adam Freer Smith had been appointed Sheriff, which occurred on 21st December 1846, as is apparent from the deed of sale of 1851 executed by the then Sheriff in favor of Rooknee Debea. The byenamah to French is dated 28th August 1846, and the deed of sale or lease the 17th December of the same year. Rooknee Begum did not purchase the rights and interests of the zemindar till 1851. This objection, therefore, to the validity of the purchase by French, falls to the ground. Besides the acknowledgement by Ishur Moostuffy that he had received payment of the consideration, and his receipt to that effect, we find also that he made over the bond, which he had received from French for the balance of the purchase-money, and which he accepted as part of the consideration to one Barranasee Banerjee, who, in 1851, brought an action against French to recover the amount of the bond, and succeeded in obtaining a decree on 12th June 1855. We are shown also, by a copy of certain proceedings, dated the 2nd of September 1859, which the appellant Kishen Koomar has been allowed to file in this Court, that the decree-holder endeavoured to enforce execution of his decree against the property pledged, but was opposed by Kishen Koomar on whose allegation of possession the execution case was struck off. These proceedings clearly show that, as far as French was concerned, he had paid the consideration, or what the vendor accepted as equivalent to part of the consideration. There can, we think, be no doubt of the *bonâ fides* of this part of the transaction;

and from the evidence of French himself, and the receipt of the Moostuffy and his admission and the decision above quoted, we think we have good and sufficient ground for believing that consideration was duly paid.

We come next to the third issue—the effect of the razeenamah and suffeenamah in the decision passed adverse to Kishen Koomar. Now, as between Kishen Koomar and Ishur Moostuffy, if these documents were executed in good faith, the effect would be that Kishen Koomar would be put into the position he seeks, *viz.*, as putneedar. But any arrangement entered into between these parties for private convenience, even if done in good faith, cannot affect the rights of third parties. The documents bear date some time in Pous 1257 (December 1850), and were accepted by the Court on 5th February 1851 (24th Magh 1257), on which date the appeal of Kishen Koomar to the Privy Council was struck off. The terms in which these documents are couched are remarkable. The victor in the litigation, and the vanquished appear to have changed places. In the document filed by Kishen Koomar, he brings forward the impudent assertion that the respondent Ishur Moostuffy, who has been successful in two Courts, had compromised the case in order to be "relieved from perjury;" and Ishur Moostuffy, the successful litigant, up to this point, is made to say in the document he filed, that it was impossible for him to reply to the appeal before the Privy Council, and that if it be decided against him with costs, meane profits, and interest, he should be utterly ruined; and, therefore, he thought it advisable to make a compromise. The Court are not in a position to determine whether these documents were really put in with the knowledge of Ishur Moostuffy. They were accepted and acted upon by the Court, through the employment of other pleaders than those who conducted the case in order to file the documents, and the terms made use of in the documents themselves, throw a suspicion on their good faith, and lead the Court to look upon them as collusive.

Accepting them, however, for argument's sake, as untainted, we have to determine whether they have the effect of setting aside the judgments adverse to the appellant Kishen Koomar. Now reading them with the pleadings in the suit, we think that they cannot affect the rights of French, provided his purchase was a *bona fide* one, which, from what we have stated above, there appears no reason to doubt. Now from the pleadings in the suit instituted by Kishen Koomar in 1846, decided by the Principal Sudder Ameen in 1848, and confirmed by the late Sudder Court in 1850, we find it distinctly set forth that though there was a treaty for the putnee lease between Kishen Koomar and Ishur Moostuffy, yet it came to nothing, for Kishen Koomar, or rather his alleged principal Madhub Chunder Sandyal, failed to fulfil the conditions of the contract, which were to the effect that he should give up the farming lease, pay off the arrears of rent within twenty days, and that the Moostuffy, after receiving the consideration money, would deliver the putnee kubala to him and have it registered. These statements, it may be said, cannot be relied upon, as they are the allegations of an adversary; but the findings of the Courts, original and appellate, concur in the conclusion that, as Kishen Koomar had failed to comply with the conditions of the contract, the deed was neither witnessed, nor registered, nor delivered, and that the allegation of payment of the consideration by Kishen Koomar was altogether unworthy of credit; and they dismissed his suit, which was equivalent to declaring that he had no right to the putnee. In the face of these findings on the evidence, it is impossible for this Court to accept as true the statements made by Ishur Moostuffy in his suffeenamah. It is evident, therefore, from the decision of the original and appellate Courts of 1848 and 1850, that, up to the time the suit was instituted, Kishen Koomar had not paid his consideration for the putnee, and was therefore still in the position of a farmer holding on a lease for ten years, which would expire in 1258 B. S. (1851 A. D.). If then, Kishen Koomar had not fulfiled his contract and obtained the putnee lease when he instituted the suit, Ishur Moostuffy was clearly at liberty to let the property in putnee to any other party, and accordingly he gave the lease of it to French in August 1846, about two months after Kishen Koomar had filed his suit; and as the decisions in that case clearly throw out Kishen Koomar's rights to the putnee, the subsequent arrangement between him and Ishur Moostuffy, however binding under other circumstances between themselves, cannot be allowed to operate to the prejudice of French, whom we have found to be a purchaser in good faith, and consequently having a preferential title. We think, therefore, that so far as the plaintiff's rights are concerned, the razeenamah and

suffeenamah between Kishen Koomar and Ishur Moostuffy have no operation and cannot act to her prejudice; and that, so far as she is concerned, they do not alter the effect of the two decisions which are adverse to the claim of Kishen Koomar. Nor does the subsequent ratification by Rooknee Debea assist the defendant Kishen Koomar as against the plaintiff.

The next point we have to dispose of relates to the possession of the defendants. Are the defendants, Hurro Soondery and Surnomoyee, widows of Madhub Chunder Sandyal, in possession; and was their husband in possession before them; and is Kishen Koomar a mere name, or is Kishen Koomar in *bonâ fide* possession of the lands, having originally acquired possession under a farming lease, and having since retained possession without any legal right? On this point the evidence on either side is meagre and unsatisfactory. Sundry witnesses were summoned by Kishen Koomar to prove possession. They were in attendance, but he allowed them to leave the Court without being examined, why or wherefore is best known to himself. A Moonsiff was directed to make a local investigation, and he reported that the lands were in the possession of the representatives of the Sandyal. But this report cannot be accepted on evidence, for the enquiry was made in the absence of the parties; the Moonsiff admitting that he had made the enquiry secretly, as otherwise he could never have got at the truth; and no notice has been taken by the Judge of the two petitions of objection against the Moonsiff's proceedings. The oral evidence adduced by the plaintiff to fix the possession of Madhub Chunder Sandyal, is not so satisfactory as might be.

Looking to the previous proceedings in the case instituted by Kishen Koomar against Ishur Moostuffy, we find that the latter, as well as another defendant Nelanauth Chatterjee, distinctly stated that the real party was Madhub Chunder Sandyal, who held possession in the name of his servant Kishen Koomar Moitro; and in the judgment of the first Court, it is distinctly found on the evidence of seven witnesses, that Madhub Sendyal went in person to the Moostuffy at Beernuggur and proposed to take the estate in putnee, and that a putnee lease was drawn up in the name of Kishen Koomar in the presence of a mohurir of the Sandyals, but that the transaction fell through as the Sandyal failed to comply with the terms of the contract. These statements and this finding would doubtless have been very strong evidence against the defendant Hurrosoondery and Surnomoye, had Madhub Chunder been a party to the suit; but he had nothing to do with it, and the question in that case was not one of possession, but whether the Moostuffy had or had not executed a putnee lease to Kishen Koomar on receipt of consideration. The fact proved was that no consideration had passed, and consequently, Kishen Koomar was not entitled to hold the property on a putnee lease. We think, therefore, that these proceedings cannot be used against the defendants who now represent Madhub Chunder.

Four witnesses have been called to prove the possession of Madhub Chunder and his heirs in the name of Kishen Koomar. These are Mullick Poramanick, Joorun Mullick, Anundo Chunder Bhoomick and Mr. French. The evidence of the three first named witnesses is to the effect that Madhub Sandyal held possession in the name of Kishen Koomar Moitro. Mullick Poramanick was at one time employed by French as a burkundaz, and while in that capacity, went to Beernugger to see the *byenamah* executed by Ishur Moostuffy. He was also a ryot of the estate, but has produced no dakhillas for rent though he deposes to have received some from one Raj Mohun Koond, the naib of Madhub Sandyal. Joorun Mulick deposes that he was appointed a tehsildar of Burneo Heglee by Madhub Sandyal in 1261, and retained the appointment till 1263 or 1264 when he resigned; that during that time he made collections which were remitted to Bansila, the Sudder Cutcherry of Madhub Sandyal; that the Sandyal was the proprietor, Kishen Koomar was his servant, *benamee* ijardar at first, and afterwards *benamee* putneedar; that since the Sandyal's death his widows have been in possession. To the evidence of this witness it is objected that he has not produced his sunnud of appointment; and though he professes to have held the office of teshildar for two or three years, he is unable to mention the name of a single ryot from whom he collected rent; and as the witness is unconnected in any way with the plaintiff, and left the Sandyal's service so many years ago, it was singular how the plaintiff knew anything about him so as to call upon him for his evidence in this case. Anundo Bhoomick deposes that he was a Mohurir in the Sandyal's employ, and lived in the Sandyal's house at Bhowanipore with Kishen Koomar; that Kishen Koomar was then receiving Rupees 10 per

mensem, and was called Dewan. This witness remained with Madhub Sandyal till he died in 1862, and knows that Madhub Sandyal managed the property in dispute, first as farmer, and then as putneedar. Now, as against the evidence of Mullick Poramanick and Anundo Bhoomick, nothing sufficient to impeach its credibility has been said; and think that it, together with the evidence of French, is quite sufficient to throw the burden of proving the fact of possession on the defendant. French's deposition on this point is quite distinct. He says that he was opposed in taking possession by Madhub Chunder Sandyal *actually*, but ostensibly by Kishen Koomar; that the Sandyal and he (French) often talked the matter over; that Kishen Koomar was the servant and *benameedar* of Madhub Sandyal; that the Sandyal came to him, and also sent to him, offering to take the property off his hands. It is said that this is the evidence of a party interested. It is so; but still that is not a sufficient ground for rejecting it as unworthy of credit. Now, what have the defendants done to refute this evidence, and to prove that Kishen Koomar was in *bonâ fide* possession and had the beneficial interest in the property? The representatives of Madhub Sandyal have produced no evidence, and in this reticence have perhaps acted wisely; Kishen Koomar called 20 witnesses of whom 15 attended, but he allowed them to leave without being examined. He cannot say that the Judge would not take their evidence, for the Judge had passed an order that the witnesses were to be examined, and the defendants alone must be blamed for allowing the parties to leave without recording their evidence; either he did not think it necessary or advisable to have it taken down, or he hoped to have a ground of appeal on the score of defective investigation. He has filed no receipts for rent paid to the zemindars, and no accounts of collection made by him have been submitted to us. We wish the evidence on this point were more conclusive; but we see no advantage in remanding the case for further local investigation, as we think that evidence now taken as to the fact of possession would be altogether unworthy of credit, and the defendants must, therefore, suffer from their own neglect.

The last point that we have to dispose of, relates to the period for which mesne profits should be awarded. The Judge has awarded mesne profits from 1258, because the plaintiff's father could, at any time during the pendency of that suit (Kishen Koomar *versus* Ishur Moostuffy), have taken possession from the Moostuffy who acknowledged Miss French's title. But the Judge forgets that the Moostuffy was not in actual possession; that Kishen Koomar or the Sandyal in his own name held it under a farming lease, and was in possession; and that, when French did try with the assistance of the Magistrate to get possession, he was told that, so long as the farming lease continued, he could not interfere with the farmer, and he was referred to the Civil Court. We think, therefore, that plaintiffs are entitled to recover mesne profits from the 23rd Aughran 1253 (7th December 1846), and on this point we modify the Judge's decision. Plaintiffs will be entitled from the date above-named to receive from the defendants what was due to the zemindars under the farming lease till it expired in 1258, and from that date to date of obtaining possession to realise from them as trespassers the full amount of mesne profits *minus* such sums as have been paid to the zemindars as rents. The mesne profits will be ascertained by local enquiry, and will bear interest from the date on which the amount is ascertained to date of liquidation. We dismiss the appeal of Kishen Koomar No. 342, and of Hurrosoonderry and others No. 343, with all costs and interest thereon from the date of decision, and we decree the plaintiff's appeal in respect to the period from which she is entitled to recover mesne profits with costs in proportion and interest thereon.

The 2nd February 1865.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Act VIII of 1859, Section 7 and 12—Splitting of cause of action.

Case No. 2431 of 1864.

Special Appeal from a decision passed by the Judge of Nuddea, dated the 6th August 1864, *reversing a decree of the Principal Sudder Ameen of that District, dated the 5th of January* 1864.

Jumoona Dassee Chowdhranee (Defendant), *Appellant,*

versus

Bamasoonderee Dassee Chowdhranee (Plaintiff), *Respondent.*

Baboos Debendro Narain Bose and *Mohendro Lall Shome* for Appellant.

Baboos Dwarkanauth Mitter and *Mohnee Mohun Roy* for Respondent.

The plaintiff claimed two estates (one in Rajshahye and the other in Nuddea) as belonging to her deceased husband, alleging dispossession by the principal defendant and persons claiming under her. She got a decree in the Rajshahye Court for possession of the land situate in that district: and then sued for the land in Nuddea, alleging a different act of dispossession from that alleged in the other suit. HELD that the object of both suits was to establish the plaintiff's husband's title, and to obtain possession of the land as the husband's widow and representative; that there was but one cause of action; and thus the plaintiff ought to have proceeded under Section 12, Act VIII of 1859, and included her whole claim in one suit brought in the Court of either district.

THE only point to be decided in this case is, whether the suit does not fall within the provisions of Section 7 of Act VIII of 1859, and consequently cannot be entertained. The following are the facts as they appear from the judgment of the Lower Appellate Court. The plaintiff considered herself entitled to two estates, the one lying in the district of Rajshahye, and the other in the district of Nuddea. She claimed them as having belonged to her deceased husband under his father's Will; she alleged that she was dispossessed of these estates by the defendant Jumoona Dassee and persons holding under her; Jumoona Dassee being substantially her real opponent as to both estates. Some time ago the plaintiff sued in the Rajshahye Court for the land situated within the jurisdiction of that Court, and she got a decree for possession of those lands. She now brings the present suit in the Court of Nuddea for the lands which lie in Nuddea, alleging that she was dispossessed by the defendants on a certain day, which day is prior to the date of the dispossession alleged in the former suit as to the Rajshahye lands. The Lower Appellate Court has held that the case does not fall within Section 7 of Act VIII of 1859, inasmuch as distinct acts of dispossession are alleged, and inasmuch as certain persons are defendants in this suit, and may have some interest in its result, who are not parties to the former suit.

We think that the decision of the Lower Appellate Court is wrong. Both the suits have been in fact instituted by the plaintiff for the purpose of establishing her late husband's title under his father's Will, and of obtaining possession of the lands as her husband's widow and representative. There is but one cause of action, *viz.*, the denial of plaintiff's title under the Will of her husband's father: and it was her duty to have proceeded under Section 12 of Act VIII of 1859, and to have included her whole claim in one suit brought by her either in the Rajshahye Court or in the Nuddea Court. It is said that there are two separate causes of action, inasmuch as the plaintiff in her plaint alleges a dispossession from the Nuddea lands on a date different from that on which she was dispossessed of the Rajshahye lands. Further, it is said that the defendants in the two suits are not the same. As to the defendants not being the same, we have to remark that Jumoona Dassee, although not originally made a defendant, has now been added as one, and defends this suit as she defended the suit in the Rajshahye Court. It is true that certain other persons are defendants in this suit who were no parties to the former one. But these persons merely claim to hold under Jumoona Dassee; and the Lower Court, although it considered it not impossible that they might have some independent defence of their own, as the lease which they had taken from Jumoona had expired, and they were tenants holding over, nevertheless finds as a fact that their possession is the possession of Jumoona, and that Jumoona is the real defendant who resists the claim of the plaintiff. In the absence of a distinct finding of the Lower Court, that the interests of these new defendants are not identical with those of Jumoona Dassee, and that she is not the sole real defendant, we must consider it as established that she is the only real defendant in this as she was in the former suit. And we think that the allegation of separate acts of dispossession does not affect the case. All the acts of ouster complained of were prior to the institution of the first suit, and should have been comprised in it, as their being legal or illegal depended solely on the question of inheritance and the validity of the Will relied on by the plaintiff; and the separate acts of ouster, so long as they were committed by the same persons and as part if the same contest, would not form distinct causes of action. The effect of bringing two suits instead of one is, that the defendant is deprived of the right of appeal to the Privy Council, which she would have had, if the whole claim had been included in one suit. Under all the circumstances of the case, it appears to us that the former suit did not include the whole of the claim arising out of the plaintiff's cause of action; and that the plaintiff having omitted to

sue for a portion of her claim, the present suit fr the portion s omitted cannot (by reason of Section 7 of Act VIII of 1859) be entertained.

The appeal is, therefore, allowed, and the plaintiff's suit is dismissed with costs.

The 2nd February 1865.

Present:

The Hon'ble C. Steer and E. Jackson, *Judges.*

Mortgage—Accounts (by Mortgage of fractional share of an estate held in joint tenancy)—Redemption (by one of several joint Mortgagors).

Case No. 31 of 1864.

Regualr Appeal from a decision of the Principal Sudder Ameen of Monghyr, in the district of Bhaugulpore, dated the 14th December 1863.

Mirza Ali Reza and others (Plaintiffs), *Appellants,*

versus

Tarasoonderee and others (Defendants), *Respondents.*

Moonshee Ameer Ali and *Mr. C. Gregory* for Appellants.

Moulvie Murhamut Hossein and *Baboos Dwarkanath Mitter* and *Unnodapersad Banerjee* for Respondents.

It is the duty of a mortgagee of a fractional share of an estate held in joint tenancy to see that he receives out of the estate all that the mortgagor ought to have received—not only that all assets are realized and brought to account, but that the expenses are regulated with care.

One of several joint mortgagors can sue alone to redeem, there being no necessity to determine the extent of his share in the mortgaged property.

THIS is a suit to redeem a mortgage and to recover a surplus up to 1264, of Rupees 45,542-10-1.

The mortgage was given in 1239 to Kassinath Sircar, deceased, by Mirza Golam Reza of his share in an estate held in joint tenancy, and the plaintiff in the suit is one of the heirs of the mortgagors.

The answer disputes the extent of the share of the plaintiff, and denies that the debt under the mortgage has been paid off out of the usufruct.

The Principal Sudder Ameen, after deputing an Ameen to enquire into the state of the collections from 1239 to 1264, considers that there is still a large balance due to the defendant on the mortgage, and dismisses the suit, and against this decision the plaintiff appeals.

It is admitted that the collections of the entire estate were made by the joint servants of all the proprietors. The defendants, the mortgages, have filed such papers as are now existing, to show what the yield of the entire estate has been for the entire period for which they have held the mortgage. They have further filed an account of their own, which they have sworn to, which professes to show what sums out of the general yield have reached their hands year by year.

Now we think that, under the circumstances in which the defendants are placed, they being mortgagees of a fractional share of a joint estate managed by common servants of the whole estate, and they only receiving their proportional share of the general assets, and having nothing to do with making the collections, the accounts which they have filed are such as to meet the obligations imposed upon a mortgagee by the law.

The mortgagees put in an account showing what they have actually received from first to last, and they make affidavit that the account is true. The general account, not being in their hands, were called for and filed by Nidhaiah Singh one of the proprietors of the joint estate; and if these accounts are such as the Court can rely upon, they are what a mortgagee is required to keep, and afford material for adjustment of the account between him and the mortgagor. The first question then we have to consider is, are the accounts to be relied upon as showing the true state of the income and expenditure of the estate during the period that the mortgage has run?

We have no reason to doubt that the accounts are the genuine accounts of the whole estate, and that the payments made to the mortgagees were upon these accounts. But it is also clear to us that the mortgagees ought not to have been satisfied with these accounts or with these payments.

It is the duty of a mortgagee of a fractional share of an estate held in joint tenancy to see that he receives out of the estate all the mortgagor ought to have received. It is his duty to see not only that all assets are realized and brought to account, but that the expenses are regulated with care. There is no evidence that, in respect to the accounts filed, the defendants exercised the slightest caution or vigilance in the

matter of these accounts. That they did any thing to ascertain that all the collections were credited to the estate, does not appear, and it is quite plain that in the matter of the disbursements there are items of expenditure which ought to have been looked into, and ought never to have been allowed.

Not doubting then that the accounts filed in this case are the genuine accounts upon which the mortgagees received their share of the net assets of the joint estate, but being clearly of opinion that they should not have been satisfied with such accounts, we cannot allow that the adjustment of accounts between the plaintiff and defendant ought to be solely upon the basis of these accounts. If, as it appears clear to us, items of expenditure have been included in the accounts, which are altogether unusual and preposterous, it is not unreasonable to infer error and mis-statement in the receipts also. It may be that the mortgagees, living far removed from the property, were not in a position to exercise a strict supervision over the management ; but it was their duty to see that they were not imposed upon by either assets being withheld or expenses entered which were not incurred. Instead of doing this, they seem to have been satisfied to receive just what was paid to them, and they cannot expect that, because they have neglected to obtain their full share of the yield of the estate, that the mortgagor is to be contented with the same.

There being then reason to think that the accounts filed, though genuine, do not represent the true state of the receipts and disbursements, and it being impossible to adjust accounts between the parties upon the basis of these accounts, some other mode of adjustment must be resorted to. A local investigation, made by a Court Ameen in this case, has, we think, supplied in a great measure the materials for making this adjustment. No great objection has been made by either party in regard to this investigation, and a careful consideration of the report satisfies us that the Ameen has conducted the investigation with care and impartially. Having ascertained from the examination of the tenants and their accounts what the gross receipts of each year actually were, he allows for collection expenses and Government revenue, and so strikes a balance. In this way he finds that, after giving the mortgagee credit for interest, and debiting him with the share he ought to have received of the net proceeds, a sum of 35,545-1-1 is still due to him on the mortgage.

We have no reason to discredit the correctness of this account, but we regret that there is a flaw in it, occasioned however by no fault of the Ameen. It is clear that there are existing tenants of the estate who did not appear before the Ameen, and if the amount of the rents paid by them had been ascertained and credited, there would no doubt be a corresponding difference in the balance in favor of the mortgagor. Every penny received would be so much to his benefit; and we regret that the incompleteness of the Ameen's investigation, in respect to the accounts of those ryots who could not be made to appear, obliges us to direct that the Ameen be deputed again to ascertain from the ryots themselves, or from any other source, what the aggregate of the rents of such ryots is, and what effect the crediting of those rents would have in reducing the large debt still due from the mortgagors. The Ameen's report will be submitted to us with the evidence upon which he bases it, that we may declare what sum is still due on the mortgage, if any sum is due at all. The Judge will be directed to depute the same Ameen as before, and his proceedings must be brought to a close with all practicable despatch, to which effect the Judge will issue instructions to the Ameen.

We are called to upon to give an opinion as to the extent of the plaintiff's share in the mortgaged property, but we think it unnecessary. It is not likely that the further investigation which we have directed the Ameen to make will have the effect of reducing the mortgage debt to any great extent. There will still be be a considerable balance due to the mortgagee, and this must be paid up in full before the mortgage can be redeemed. One of several mortgagors may redeem, and if the plaintiff, who is one of the mortgagors, choses to pay the full debt upon the mortgage, the mortgagee must take it and release the property, no matter what the share of the plaintiff in the suit may be. If there was any likelihood that the result of the Ameen's investigation to be made would be to show that the mortgage debt had been paid off, it would be still unnecessary to determine what the plaintiff's interest in the mortgaged property is.

It is clear he is one of several joint mortgagors, and if he can show that the debt has been paid off, the whole property must be given up, though all the joint mortgagors have not joined in the suit to redeem. We repeat then there appears to us no occasion

to go into the question as to what the share of the plaintiff is in the mortgaged property.

The 2nd February 1865.

Present :

The Hon'ble C. Steer and E. Jackson, *Judges.*

Costs (of defendants unecessarily made parties to a suit).

Case Nos 2723 and 2724 of 1864.

Special Appeals from a decision passed by the Judge of Behara, dated the 20th June 1864, affirming a decision passed by the Principal Sudder Ameen of that District, dated 24th November 1863.

Syud Afzul *Hossein* and others (Defendants), *Appellants,*

versus

Heera Lall (Plaintiff), *Respondent.*

Moonshee Ameer Ali and *Mr. J. Baptist* for Appellants.

None for Respondent.

The plaintiff bought a decree obtained by third persons against the special appellants. In execution an alleged vendor (but not the special appellants) raised objections. HELD that the plaintiff had no cause of action against the special appellants, and was therefore liable to pay them their costs.

THE only objection raised on special appeal in these cases, is that the Judge has wrongly made appellants pay their own costs in the Lower Courts when they were unnecessarily made parties to a suit with which they had no connection, and when they had not given the plaintiff any ground for bringing any suit against them.

This objection appears to us valid. The plaintiff had bought a decree obtained by other parties against the special appellants. The plaintiff proceeded to execute it, when one of the alleged vendors raised objections, and plaintiff was obliged to bring a fresh suit as against that vendor to establish his right to execute the decree in place of that vendor. The plaintiff gained his case; but the Judge is wrong in supposing that, in such a state of facts, it was necessary to make the defendants parties to the suit. They had not objected to the execution of the decree on the part of plaintiff, and as against them plaintiff had no cause of action. Plaintiff should, therefore, on the usual rule and principle upon which costs are awarded, pay these special appellants costs in both Courts, and we modify the Judge's order to that extent.

Appeal decreed with costs on respondents.

The 2nd February 1865.

Present :

The Hon'ble G. Campbell and F. A. Glover, *Judges.*

Onus probandi—Right of possession of land belonging to another party.

Case No. 2393 of 1864.

Special Appeal from a decision passed by Mr. R. Alexander, Officiating Judge of Cuttack, dated the 30th May 1864, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 30th June 1864.

Moorolee Dhur Pandah (Defendant), *Appellant,*

versus

Mothooranund Doss (Plaintiff), *Respondent.*

Baboo Obhoy Churn Bose for Appellant.

Baboo Kedarnath Mojoomdar for Respondent.

Suit by a Lakherajdar to set aside an Act IV award retaining the defendant in possession of certain lands belonging to a Hindoo Temple. The plaintiff alleged that the defendant's brother was cook to the Temple, and that, on his death, the land in dispute (which formed his wages) was given to another. The defendant claimed the land in hereditary right as servant of the Temple. HELD that the *onus* of proving a right to the possession of the land of which the plaintiff was the acknowledged owner, lay on the defendant who claimed such right.

THIS was a suit to reverse an award under Act IV of 1840, whereby the special appellant had been retained in possession of certain service land belonging to a Hindoo temple.

The special respondent is the admitted lakherajdar of the lands in question. His statement is, that the special appellant's brother was at one time engaged as cook to the temple, and that on his death the land in dispute, which formed his wages for the work done, was given to another.

The special appellant claimed the land in hereditary right as Sevait of the temple.

The Court of first instance dismissed the case, holding that the plaintiff had failed to show that the defendant was a mere menial servant, whilst the defendant himself had established his right as Sevait.

The Judge, however, decided that this right was not proved, and that as the defend-

ant was not at the time of the suit the temple cook, he had no claim to the land.

It is urged in special appeal, that the Judge has placed the *onus* on the wrong party; that the special respondent was bound to prove that the special appellant's *status* was that of a cook; and as he failed in that, his suit ought to have been dismissed.

We see no reason to interfere. Special respondent is the acknowledged owner of the land; and being so, the onus of proving a right to the possession thereof lay on the party claiming such right. The special appellant came into Court denying the fact of service of cook, and claiming to hold the land in his capacity of Sevait. This plea he altogether failed to establish, and this was the only point necessary to be enquired into in the case. Failing his right to possess the land as Sevait, there was nothing for the special appellant to fall back upon; for even had he been shewn to be the temple cook, there was nothing in that position to save him from ejectment at the will and pleasure of his master, the special respondent.

In no point of view, therefore, do we think that the special appellant has any case; and we, therefore, dismiss his special appeal with costs.

The 2nd February 1865.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Limitation—Issue for trial.

Case No. 2471 of 1864.

Special Appeal from a decision passed by the Judge of the Twenty-four Pergunnahs, dated the 30th July 1864, *reversing a decision passed by the Principal Sudder Ameen of that District, dated the 14th January* 1864.

Kedarnath Acharjee and others, (Defendants,) *Appellants,*

versus

Bhugwan Chunder Nundee and others (Plaintiffs), *Respondents.*

Mr. R. T. Allan and *Baboos Banee Madhub Banerjee* and *Oopendur Chunder Bose* for Appellants.

None for Respondents.

Where the defendant pleads limitation, by reason of the plaintiff not having had possession within 12 years, the first issue for decision is whether the plaintiff was in possession within 12 years. Possession "of late years" is no distinct finding.

THERE is but one substantial ground of special appeal in this case, *viz.*, that the Lower Appellate Court is wrong in not having found distinctly whether the plaintiffs had or had not been in possession of the lands sued for, or any portion of them, within 12 years prior to the date of suit. The defendants have from the first pleaded limitation, their case being that they alone have had possession for some 30 or 40 years, and that the plaintiffs have never been in possession during that time.

The Lower Appellate Court, while recognising the fact that the question of the plaintiff's possession *within* 12 *years* was raised by the defendants, gives no distinct finding on the point, but merely decides that the plaintiffs had possession "of late years." The decree of the Court was in favor of the plaintiffs; and the defendants now appeal, contending that the fact of the plaintiffs having had possession at any time *within* 12 *years*, was the first issue which the Court should have decided, and that, if that issue had been decided in the defendant's favor, it would then have been unnecessary to go into the comparative merits of the titles set up by them and the plaintiffs respectively.

We think the judgment of the Lower Court is defective. It was clearly necessary for the plaintiffs to establish in the first instance that they had been in possession within 12 years, and that the defendants were entitled to a distinct finding on that issue. Possession "of late years" is no distinct finding, and it is in truth wholly impossible from the judgment to say with certainty, whether the Judge was or was not of opinion that possession within 12 years was proved. The case of Ram Ruttun Roy *versus* Komul Narain Roy (S. D. A. Rep. for 1860, volume II, page 338) is in point. As in that case, so in this, the Lower Court should have in the first place considered what evidence there is that the plaintiffs (respondents) or any person through whom they claim, were in possession of the lands in question at any time within 12 years next before the commencement of the suit. The case must be remanded for a distinct finding on this question. If the plaintiffs cannot prove the alleged possession which is essential to the maintenance of the suit, the suit must, of course, be dismissed, for it would then be unnecessary to enter at all into the question of title.

The 2nd February 1865.

Present:

The Hon'ble Shumboonauth Pundit and A. G. Macpherson, *Judges.*

Supplemental plaint—Immaterial mistake—Excess quantity of land within specified boundaries.

Case No. 2509 of 1864.

Special Appeal from a decision passed by the Officiating Additional Judge of Bhaugulpore, dated the 31st May 1864, modifying a decision passed by the Principal Sudder Ameen of that District, dated the 24th April 1861.

Rajah Joy Mungul Singh (Defendant), *Appellant,*

versus

Rajah Mohendur Narain Singh (Plaintiff), *Respondent.*

Baboo Kalee Prosunno Dutt and *Kishen Succa Mookerjee* for Appellant.

Baboo Debendro Narain Bose for Respondent.

The plaintiff sued to set aside certain Survey proceedings and to obtain possession of land of which he had, by means of those proceedings, been dispossessed by the defendant. The Lower Court decreed the suit, finding as a fact that the plaintiff had been dispossessed by the defendant, though not by means of the Survey proceedings. HELD that the manner of dispossession was immaterial so long as the fact was proved.

The plaintiff gave his boundaries as 36 beegahs. On measurement the boundaries having been found to contain 44 beegahs, the plaintiff was allowed to file a supplementary plaint claiming 44 beegahs but still within the boundaries originally given by him. HELD that his mistake in calling 44 beegahs 36 beegahs did not render it improper or irregular to give him a decree for the 44 beegahs contained within the boundaries originally given by him.

WE think that the decision pleaded from is right and must be confirmed. The plaintiff sued to set aside certain Survey proceedings, and to obtain possession of lands of which he had (by means of those proceedings) been dispossessed by the defendant. The Lower Court finds that the Survey proceedings were all in plaintiff's favor, and that there was no dispossession by means of them. But it finds that nevertheless, the plaintiff had as a matter of fact been dispossessed by the defendant of the lands in question; and a decree was given in plaintiff's favor. In appeal, it is contended that as the plaintiff stated his dispossession to be owing to the Survey proceedings, and it appeared that the dispossession was *not* owing to those proceedings, he could not in this suit get a decree. But we think he could; as his suit was throughout one for possession of those lands, and it is immaterial in what manner he was dispossessed, so long as it is proved, as it has been, that he was really dispossessed by the defendant.

Then it is urged that the issue of possession and dispossession has not been properly tried. The Court finds distinctly that the plaintiff was dispossessed by the defendant, and nothing has been shewn us which leads us to suppose that this conclusion was arrived at on other than sufficient grounds.

Lastly, it is said that the decree is bad, as being for 44 beegahs, whereas the plaintiff himself in his plaint originally sought only 36 beegahs. This point arises merely out of a difference of measurements. The plaintiff gave his boundaries correctly, and stated that they contained 36 beegahs. On measurement, those boundaries were found to contain 44 beegahs. Therefore the plaintiff was allowed to file a supplemental plaint claiming 44 beegahs, but still claiming only the land within the boundaries from the first given by him. As the plaintiff has substantively got a decree for no lands save what he originally sued for, we do not think that his having by mistake called them 36 beegahs, when they were in fact 44 beegahs, render it improper or irregular to give him a decree for the 44 beegahs contained within the boundaries originally given by him.

The appeal is dismissed with costs.

The 2nd February 1865.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Ejectment (by Zemindar of a defaulting holder of a transferable tenure under Clause 7 Section 15 Regulation VII. 1799).

Case No. 2085 of 1861.

Review of judgment passed by the Hon'ble H. V. Bayley and A. A Roberts, C. B., Judges of this Court, in the above case, on the 16th of December 1863.

Narayunee Dassee and others (Defendants), *Appellants,*

versus

Rajnarain Ghose and others (Plaintiffs), *Respondents.*

Baboo Aushootosh Dhur for Appellants.

Baboo Mohendro Lall Shome for Respondent.

An ouster by the zemindar of a defaulting holder of a tenure transferable by sale, without application to any Court, is illegal under Clause 7, Section 15, Regulation VII of 1799. The proper course is for the zemindar to apply to the Dewanny Adawlut to have the tenure sold in satisfaction of the arrear.

THIS case comes before us for review of judgment. Various questions have arisen and been disposed of in the course of the suit. The only point which we have now to decide is whether the zemindar under whom the appellant holds, acted legally in dispossessing a former pottahdar and selling his tenure to the appellant, who now claims to be entitled to possession as pottahdar. The facts are as follow:—The appellant purchased the rights of a former pottahdar in certain lands. The pottah was a transferable one and contains a proviso that, if the tenant allowed the rent to fall three years in arrear, the zemindar might take possession of the land again. The original pottahdar did let the rent fall three years in arrear. The zemindar thereupon, without applying to any Civil Court, ousted the pottahdar, sold the pottah to the appellant, and gave him possession. All this was before Act X of 1859 came into operation. The original pottahdar instituted this suit (subsequent to the passing of Act X of 1859) to recover possession under his pottah, contending that the zemindar, under Clause 7 of Section 15 of Regulation VII of 1799, legally ousted the pottahdar without application to any Court. Whether this is so or not is the question before us.

We are of opinion that the zemindar had not the right contended for. The right of ouster, without application to the Courts, is, by Clause 7 of Section 15 of Regulation VII of 1799, given to the zemindar merely in the case of lease-holders, or other tenants having the right of occupancy only so long as they pay a certain rent, &c., "without *any right of property or transferable possession.*" But "if the defaulter be a defendant talook-"dar or the holder of any other tenure, which "by the title deeds or established usage of the "country is transferable by sale or otherwise, "it may be brought to sale by application "to the *Dewanny Adawlut*, in satisfaction "of the arrear of rent." It is clear that in the present instance the defaulter was the holder of a tenure transferable by sale. Consequently the only proper mode in which the zemindar could deal with him was "by application to the Dewanny Adawlut," to have had the tenure sold in satisfaction of the arrear. The ouster of the pottahdar, without application to any Court, was therefore wrong.

The order originally made by this Court in special appeal will stand; but, under the circumstances, the parties will bear their own costs of this review.

The 2nd February 1865.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Leases (by Ijaradars and Naibs).

Case No. 2456 of 1864.

Special Appeal from a decision passed by the Principal Sudder Ameen of the 24-Pergunnahs, dated the 20th June 1864, *reversing a decision passed by the Additional Sudder Ameen of that District, dated the 13th December* 1863.

Ooma Tara Debia (Defendant), *Appellant,*

versus

Peena Bibee (Plaintiff), *Respondent.*

Baboos Anund Chunder Ghossal and *Upprokash Chunder Mookerjee* for Appellant.

None for Respondent.

A lease granted by an ijaradar is not good beyond the term of the ijara.

It does not lie within the ordinary scope of a Naib's authority to grant leases; special authority to grant them is necessary.

IN this case, the grounds of special appeal are two, *viz.*, that the lease under which the plaintiff (respondent) claims, is only a lease granted by a naib, and, as such, is of no avail in the absence of proof of the authority of the naib to grant it; and, secondly, that the lease is granted by the naib of an ijaradar whose ijara ended in 1267, and the lease, which is in its term transferable and without any fixed limit to it, is consequently inoperative subsequent to 1267. We think that both the objections, which have been taken by the appellant, are valid. It is clear that a lease granted by an ijaradar can be good only so long as the ijara itself remains in existence, and that it is worthless for any period subsequent to the expiry of the ijara. And it has recently been held on several occasions by this Court, that it does not lie within the ordinary scope of a naib's authority to grant leases, but that special authority to grant them must be proved.

The case must be remanded that it may be distinctly ascertained whether the naib

had any special authority to grant the lease which is relied upon. If it be found that he had such authority, the Court will then consider what is the legal effect of the lease, with reference more especially to the date of expiry of the ijara, and will decide the case accordingly.

The 3rd February 1865.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Principals and Agents—Loans for both—by the latter.

Case No. 2525 of 1864.

Special Appeal from a decision passed by Mr. J. O. Bell, Principal Sudder Ameen of Dacca, dated the 18th June 1864, affirming a decision passed by Mr. T. O. Pennington, Sudder Ameen of that District, dated the 23rd February 1863.

Juggurnath Roy Chowdhry (Plaintiff), *Appellant,*

versus

Munorekha Dossee and others (Defendants), *Respondents.*

Baboos Sreenath Doss and *Onookool Chunder Mookerjee* for Appellant.

Baboos Romesh Chunder Mitter for Respondents.

Suit for money lent to an agent to a guardian mother—HELD that the agent exceeded his authority in mixing up his private transactions with those of his principal, by borrowing money both for himself and his principal; and as he had failed to prove that the money was borrowed for the benefit of the estate, and as the transaction on the part of the lender was not *bonâ fide*, inasmuch as he did not use proper diligence to satisfy himself that the agent was borrowing for the legal necessities of the estate, a decree was passed against the agent personally.

THE plaintiff is the special appellant. He sued Munorekha in her capacity of guardian of three minors, her sons, and Sham Shoondur, the attorney of the said lady, to recover Rupees 800, of which Rupees 700, the principal, and 100 Rupees interest, were due on a bond, dated 6th Pous 1268 B. S.

Munorekha answered that she had not given Sham Shoondur authority to borrow money on her account; that there was no necessity to borrow money on behalf of the estate of her wards, and that the monies were not appropriated to the payment of the Government revenue due from the estate, or to any purpose connected with the estate; that the bond recited that monies were borrowed for the purpose of Sham Soondur; that, though incidental mention is made of a portion of the sum being borrowed for the maintenance of the minors, no monies were applied for any such purpose, and, therefore, the estate of the minors is in no ways chargeable; that the estate was not embarrassed, and that there was no legal pressure or necessity for raising money.

The mooktear Sham Shoondur answered, admitting execution of the bond, but urging that no portion of the money was borrowed for his private purposes; that the whole sum was borrowed for the purposes of the estate and for the maintenance of the lady and her wards; that the name of the answering defendant was lent to the transaction, inasmuch as he was the general agent of the estate.

The Lower Appellate Court dismissed the plaintiff's suit, the Principal Sudder Ameen holding that the bond showed that Sham Shoondur executed it as agent and on his own account, and that a portion of the money was borrowed for his own purposes; that as the bond does not recite how much was borrowed for the purposes of the estate, and how much for the private purposes of the agent, the latter was not authorized to mix up his own private transactions with those of his principal; and further that the *bonâ fides* of the transaction had not been established.

We find that the bond recites that the monies were borrowed for the purposes of both principal and agent; but there is no specification of the amount for which each party is liable. We think that the agent exceeded his authority in mixing up his private transactions with those of his principal; and as both Courts have found on consideration of the evidence that the transaction, on the part of the lender, was not *bonâ fide*, inasmuch as he did not use proper diligence to satisfy himself that the agent was borrowing for the legal necessities of the estate, we hold that the agent alone is liable; and as he admits execution of the bond, and has failed to prove that he borrowed for the benefit of the estate, a decree may pass against him personally.

We amend the decision of the Lower Court. The plaintiff is entitled to a decree against Sham Shoondur with costs of all the Courts, but he must pay Munorekha's costs throughout.

The 3rd February 1865.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Jurisdiction (of Civil Court)—Suit for possession and wasilat by setting aside a pottah—Plea of jurisdiction when admissible.

Case No. 2510 of 1865.

Special Appeal from a decision passed by Pundit Tarakant Bidyasagur, Principal Sudder Ameen of Jessore, dated the 5th July 1864, *affirming a decision passed by the Moonsiff of that District, dated the 4th November* 1862.

Bidhobudden Mookerjee (Defendant), *Appellant,*

versus

Doorga Monee Debia (Plaintiff), *Respondent.*

Baboos Prosunno Coomar Sein and *Kedarnath Mojoomdar* for Appellant.

Baboo Greeja Sunkur Mojoomdar for Respondent.

A Civil Court has jurisdiction in a suit "for possession and wasilat by setting aside a pottah," the main objects of it being possession and wasilat, while the cancellation of the pottah is a matter of consequential relief only.

A plea of jurisdiction may be admitted even though not taken in the petition of special appeal nor before the Lower Appellate Court.

In this case, the pleas in special appeal are :—

I. That the main object of the suit was to set aside a pottah, and that, therefore, the suit should not have been brought in the Civil Court.

II. That as the opposite party had before sued the special appellant for arrears of rent setting herself forth as landlord and the other party as tenant, on the allegation of the pottah of which he now sues for the cancellation, there exists that relation of landlord and tenant, which ousts the Civil Court of jurisdiction.

The opposite party contend that they never sued for arrears in the Revenue Court; but that defendant falsely put in such a suit there in their names and then withdrew it, and that there was no pottah produced and no adjudication in respect to it.

We observe on the *first* plea that the claim is in the vernacular "for possession and wasilat by setting aside a pottah." We think the main objects of such a sui are possession and wasilat, and that the cancellation of the pottah is a matter of consequential relief only.

On the *second* plea, we observe that it was not not taken in the petition of special appeal, nor apparently before the Lower Appellate Court in the form in which it is now taken. Still, if it were really a plea which did, in fact, affect jurisdiction, we would consider it even at this stage. But such is not the case. The proceedings in the Revenue Court do not, in our opinion, at all prove the relation of landlord and tenant, or that the matter of the pottah now sought to be cancelled was then adjudicated

We, therefore, dismiss this special appeal with costs.

The 3rd February 1865.

Present:

The Hon'ble C. Steer and E. Jackson, *Judges.*

Damages (payable to landlord for injury to land by ryot).

Case No. 2743 of 1864.

Special Appeal from a decision passed by the Principal Sudder Ameen of Hooghly dated the 27th July 1864, *affirming a decision of the Moonsiff of that District, dated the 19th April* 1863.

Kadumbenee Dabee (Plaintiff), *Appellant,*

versus

Nobeen Chunder Adukh and others (Defendants), *Respondents.*

Baboos Taraprosunno Mookerjee, Baney Madhub Banerjee, and *Otool Chunder Mookerjee* for Appellant.

Baboo Greesh Chunder Ghose for Respondents.

A ryot injuring his land by taking or allowing another person to take earth for the purpose of making bricks, is liable for damages to his landlord for the permanent damage thus done to his property.

This is a suit for damages on account of injury done to the plaintiff's property by the defendants, the ryots of the land, having made excavations in it.

The defendants said that the land had not been injured at all, and that, if it had been, they were *istumrardars,* and had a right to make the excavations in the land.

The High Court directed the trial of the case by the Moonsiff as there was a question of right to the land involved in the case.

The first Court found that the defendants were ryots of a very remote period, and that

they had done no injury to the land, but had, on the contrary, improved its condition. In this view it dismissed the suit.

The Principal Sudder Ameen thinks that the defendants were compelled to allow the contractor to make the excavations for the purpose of making bricks, and that the plaintiff ought, instead of suing the defendants for damages, to have sued them for the compensation received for the earth taken for the bricks by the contractor.

This judgment cannot stand. No doubt any ryot who destroys his land by making holes in it for providing earth for bricks, or allows another to do so, renders himself liable for damages to his landlord for the permanent damage done to his property by that means. The questions, therefore, to be tried are: whether the land, taking its former condition into consideration, has been permanently destroyed or injured by the defendants, allowing the contractors to make an excavation or excavations in it; and what is the measure of damages to which the plaintiff is entitled, supposing it to be found that the land has been injured by the excavations which have been made in it?

For the trial of these questions we remand the case to the Principal Sudder Ameen.

The 3rd February 1865.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Discretion of Court in adding defendants under Section 73 Act VIII of of 1859.

Case No. 2524 of 1864.

Special Appeal from a decision passed by Moulvie Nazeeroodeen Mahomed, Principal Sudder Ameen of Hooghly, dated the 6th June 1864, *affirming a decision passed by the Moonsiff of that District, dated the* 10*th July* 1863.

Gyaram Seal and others (Defendants), *Appellants,*

versus

Issur Chunder Chuckerbutty (Plaintiff), *Respondent.*

Baboo Kedarnath Moojoomdar for Appellants.

Baboos Mohinee Mohun Roy and *Mohesh Chunder Chowdhry* for Respondent.

It is discretionary with a Court to add defendants under Section 73 Act VIII of 1859. The exercise of such a discretion cannot be interfered with unless it is manifestly unjudicial and wrong.

In this case, the defendant purchased at an auction-sale, in execution of a decree held by Government, the right and interest of a judgment-debtor in certain lands. The present plaintiff appeared in the execution of decree proceedings, and claimed the land under a prior sale from the judgment-debtor, but his claim was disallowed. He then instituted this suit to establish his title, and has got a decree from the Lower Court.

In appeal, it is urged that the suit is incomplete in its frame as the Government has not been made a party, although both the Lower Courts were specially prayed to add the Government as a defendant under Section 73 of Act VIII of 1859. It may, perhaps, be that it would have been more convenient, and for the interest of the defendant, that the Government should have been a party. But the Court has clearly a discretion as to adding or not adding defendants under the Section referred to, and with the exercise of such a discretion this Court will not interfere unless it has been an exercise manifestly unjudicial and wrong. Here we cannot say that it was necessarily wrong. The plaintiff sought no relief against Government. The suit was quite complete without the Government, and the Government was not necessarily affected by any decree made.

We dismiss the appeal with costs.

The 3rd February 1865.

Present:

The Hon'ble C. Steer and E. Jackson, *Judges.*

Enhancement of rent (by dur-ijaradar.)

Case No. 2601 of 1864.

Special Appeal from a decision passed by Mr. C. P. Hobhouse, Judge of Midnapore, dated the 25th June 1864, *modifying a decision passed by the Moonsiff of that District, dated the 31st March* 1864.

Gungaram Bearer (Defendant), *Appellant,*

versus

Ujoodhyaram Mytre (Plaintiff), *Respondent.*

Baboo Byeantnath Paul for Appellant.

Baboo Roopnath Banerjee for Respondent.

A dur-ijaradar can enhance the rents of the estate of which he holds the sub-lease.

The point argued in special appeal is the power of a dur-ijaradar to enhance rents.

We think that, as an ordinary rule, a dur-ijaradar is empowered to enhance the rents of the estate of which he holds the sub-lease. In this particular case it is pleaded that the dur-ijaradar is barred by the effect of a decision passed in another case. The decision has been read to us, and we find that it contains no provision against enhancing. We accordingly dismiss this special appeal, in which the power of the dur-jaradar is questioned, with costs.

The 4th February 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Suit for reimbursement by sharer—Limitation—Cause of action.

Case No. 103 of 1864.

Regular Appeal from a decision passed by Moulvie Mahomed Nazir Khan, Principal Sudder Ameen of Mymensing, dated the 11th January 1864.

Bykant Nath Saha and others (Defendants), *Appellants,*

versus

Gour Monee Dassee Chowdhrain (Plaintiff), *Respondent.*

Mr. R. T. Allan and *Baboo Unnoda Pershad Banerjee* for Appellants.

Baboo Srenath Doss for Respondent.

Suit laid at Rupees 5,426-6 annas.

Case No. 471 of 1863.

Special Appeals from a decision passed by Mr. J. D. Dodgson, Judge of Mymensingh, dated the 3rd December 1862, *reversing a decision passed by Moulvie Mahomed Nazir Khan, Principal Sudder Ameen of that District, dated the 4th October* 1862.

Bunwaree Mohun Saha (Plaintiff), *Appellant,*

versus

Prannath Saha and others (Defendants), *Respondents.*

Baboos Unookool Chunder Mookerjee and *Sreenath Doss* for Appellant.

Baboo Unnoda Pershad Banerjeee for Respondents.

Suit laid at Rupees 2,530-5 annas 3 pie.

Suit by a sharer for reimbursement of payments made by her over and above her share to save the property from sale in execution of a decree for rent at the suit of the zemindar who had obtained a former decree, which, however, he was prevented by a subsequent order of the Court from executing. HELD that the date of payment by the plaintiff and not the date of the original decree furnished the cause of action from which limitation was to count.

No. 103.—THE facts out of which this case arises are not very complicated and are as follow:—

The zemindar sued the ancestors of the defendants for arrears of rent due on an ijara, and gained his decree on the 24th of March 1836. He then took steps to bring the property of the defendants to sale, when they petitioned, claiming the land as debuttur, and obtained its release. The zemindar thus baffled, brought a regular suit to remove the order for release, and, at last, gained a decree in 1856. When, in accordance with this last decree, the property was put up for sale, the plaintiff in the appeal now before us and two *pro-formâ* defendants, paid the claim.

The present suit was then brought to recover the amount due from other sharers, representatives of the original lease-holders, and to reimburse the plaintiff for her payments over and above her own proper share of Rupees 681-4 annas.

The Principal Sudder Ameen, rejecting a plea of the defendants that the suit was barred by limitation, has given the plaintiff a decree for a sum of Rupees 3,990-2-0 representing the original principal and interest of 1836, with interest in addition of Rupees 1,436-3-3, and costs and interest on the principal in the case.

It is admitted that another case, Special Appeal No. 471 of 1863, will be governed by the decision in the present suit.

The position of the family will be understood from the subjoined tree, to which the number by which the defendants have been known in this suit, is added:

Huree Churn

Doorga Ram	Sham Kishore	Nidhee Ram
Nubo Kant	Muthoora Kant	Lokenath
(1) Gocoolnath widow Gour Monee (plaintiff)	(2) Golucknath Bunwari	defendants Nos. 10,11,12.
(3) Radhanath	(No. 13) *pro-formâ* defendant.	defendants Nos. 7,8,9.

defendants Nos. 4 & 5
Pearee Mohun
Lyleet Mohun.
(4) Prannath (No. 1 defendant.)
(5) Chundernath (No. 2.)
(6) The husband of defendants Nos. 3 and 6.

It appears that the lease, on which the rent to the zemindar was due, was held by the three brothers in the third generation

back,—Nubo Kant, Mothoora Kant, and Lokenath—in the name of their gomashtah Kebul Krishno; and that the decree of the zemindar was gained against Gocoolnath, Golucknath, and Pearee Mohun defendant No. 4, the son of Radhanath. The main contention before us has been, whether the plaintiff ought not to have sued within 12 years after the original decree of 1836, and whether she was justified in waiting so long, and for the result of the second litigation and her consequent payment of the full claim of the zemindar for which she now seeks indemnification at the hands of the representatives of the other shareholders. On this, we have heard very earnest arguments on both sides; but we are quite clear that the date of the payment of the money by the plaintiff, and not the date of the original decree, is the plaintiff's legal starting point. It may be said, on the other hand, that the plaintiff had the remedy in her own hands all along, and that she might have sued the other shareholders as soon as the decree for rent was given; that the debt was still the debt, whatever might be the contest about the sale and attachment of the property; that it may be very hard to ascertain and fix the original status, rights, and liabilities of the members of the family as they were 25 or 30 years ago; and that the obvious neglect of the plaintiff to do this will not keep alive or sustain the liability of the other shareholders.

But we think that the date of payment alone must be taken as furnishing the cause of action. Before the payment on her own part, the plaintiff had really no grounds for proceeding against any of the shareholders, whether named in the decree for rent or not; and had she sued, she might have been put out of Court as wanting a ground of action, or, at any rate, she might have been told that, until payment, her action was premature. This view of the case seems to us sound, and is wholly in accordance with the doctrine laid down in Story's Equity Jurisprudence, Volume I, pages 562 to 592, where payment is clearly contemplated as furnishing sureties, and others similar situated, with a right to sue for reimbursement.

In this view of the case, we hold that the Principal Sudder Ameen was right in deciding the action on its merits, taking the payment made after the decree of 1856 as the cause of action, and that the Judge's reasoning on the separate special appeal is wrong.

We now come to the merits, and on this point, the reasons given by the Principal Sudder Ameen, at page 5 of the special appeal case, and referred to by him in his decision in the regular appeal, are too full and strong to leave any doubt that the parties sued are representatives of the joint shareholders. Indeed, the appeal was not pressed on us with any hope of disturbing the decision on the merits, after the plea of limitation was decided by us adversely to the appellants.

But two other points remain—On the first which relates to the apportionment of the shares due by the defendants in peference to a joint decree against them all, we are clear that the modification suggested by the appellants, and not opposed by the respondent, can and ought to be granted. The original shares of the lease were held in the proportion of 6 annas by Nubo Kant and of 5 annas each by Muthoora and Lokenath. The apportionment of liabilities of each defendant now sued, must be calculated with reference to the above basis, according to their descent.

But with regard to the actual sum decreed, we think that there is room for alteration. The original debt due to the zemindar amounted, principal and interest together, to little more than Rupees 1,500 in 1836. The defendants must be held liabl for their share of this sum, and their share of costs in that suit together with interest on the same from that day to date of realization. But they will not be liable for any share of the expense caused by the intermediate litigation which, whether in the shape of a miscellaneous or of a regular suit, lasted until 1856, whether the same consist of any sum decreed against the plaintiff or of costs in that suit. The calculation must be made of the defendant's liability for a share of the original sum, principal and interest due in 1836, with interest at 12 per cent on the said share up to the present date, and so on to date of realization by the plaintiff. The defendants will also be liable for their share of costs in that suit.

With regard to the special appeal, both parties are agreed to take the decision of this Court without further enquiry or litigation to the same effect. The decision then is, that the Judge's order of the 3rd of December 1862 be set aside, and that of the Principal Sudder Ameen of the 4th of October 1862 be restored, and that a calculation of the amount due from each defendant, accord-

ing to his share, be made on precisely the same basis as in the regular appeal detailed above.

The 4th February 1865.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Consequence of mooktear's inability to answer—Dismissal of suit under Section 127 Act VIII of 1859.

Case No. 3034 of 1864.

Special Appeal from a decision passed by Lieutenant E. Money, Deputy Commissioner of Maunbhoom, dated the 12th July 1864, *affirming a decision passed by Baboo Rughoonath Ghose, Moonsiff of that District, dated th 29the June* 1863.

Maharajah Nilmonee Singh Deo Bahadoor (Plaintiff), *Appellant,*

versus

Ram Huree Misser and others (Defendants), *Respondents.*

Baboo Roopnath Banerjee for Appellant.

Baboo Romesh Chunder Mitter for Respondents.

The plaintiff's mooktear being unable to answer certain questions necessary for the statement of the proper issues, the plaintiff was called upon either to appear personally and reply to the Court's queries, or to send some one who could reply. Having done neither—HELD that the Lower Court was competent to dismiss the suit under Section 127 Act VIII of 1859.

THE special appellant in this case, the Rajah of Paekote, was plaintiff in a resumption suit before the Moonsiff of Maunbhoom. In the course of the proceedings his mooktear was called upon to answer certain questions, in order that the proper issues might be fixed. He was unable to do so, and his principal was called upon either to appear personally and reply to the Court's queries, or to send some one who could so reply. The plaintiff did neither the one nor the other, although the case was delayed on three several occasions for his convenience, and at last not being able to get the necessary information, the Moonsiff dismissed the suit under Section 127 of the Civil Procedure Code.

It is urged in special appeal: (1) That as the mooktear was present, the case should have been allowed to proceed, and have been decided on the merits; and (2) That a mooktear did appear and offer to give the necessary information.

With regard to the first objection, we observe that the Moonsiff was quite within the law in acting as he did. The special appellant was, it appears, exempt from personal attendance in the Court; but the Moonsiff only required that some one should come forward on his part and answer the questions; and as no one came, Section 127 clearly applies. We observe that the questions proposed to be asked were duly recorded, as required by the late Sudder Court's Circular Order, dated 29th July 1859.

The second objection is altogether untenable. No one appeared till the case had been decided, and then it was too late.

The special appeal, therefore, is dismissed with costs.

The 7th February 1865.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Appellate Court (Power of, to try issue in bar overlooked by first Court).

Case No. 2666 of 1864.

Special Appeal from a decision passed by Moulvie Mahomed Nazim Khan, Principal Sudder Ameen of Mymensingh, dated the 20th July 1864, *reversing a decision passed by the Moonsiff of that District, dated the 21st August* 1863.

Brojo Soondur Hoom Roy (Plaintiff), *Appellant,*

versus

Gour Kishore Hoom Roy and others (Defendants), *Respondents.*

Baboos Nil Madhub Sein and *Anund Chunder Ghossal* for Appellant.

Baboo Prosunno Coomar Sein for Respondents.

A Lower Appellate Court need not remand a suit to the first Court to try an issue in bar overlooked by the first Court, but may determine the issue itself, if there is sufficient evidence to enable the Court to do so.

THERE has been no error of law in the procedure of the Court below. The Court of first instance, overlooking the issue in bar, decided the case on the merits. The Lower Appellate Court, finding that there was sufficient evidence upon the record to enable it to pronounce a satisfactory judgment, determined the issue in bar adversely to the special appellant. There was no necessity to remand the suit to the Court of first instance

to try the issue which had been overlooked, as there was sufficient evidence to enable the Appellate Court to do so. This procedure is that enjoined by Section 353 of the Code of Procedure.

The appeal is dismissed with costs and interest.

The 7th February 1865.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and F. B. Kemp, *Judge*.

Limitation (Commencement of)—Ejectment under an Act IV award.

Case No. 362 of 1863.

Application for Review of Judgment passed in Special Appeal, No. 1432 *of* 1862, *by the Hon'ble J. P. Norman, and F. B. Kemp, on the* 13*th April* 1863.

Mr. J. Lyons (Appellant), *Petitioner*,

versus

Raj Chunder Shikeressur Roy and others (Respondents), *Opposite party*.

Mr. R. T. Allan and *Baboos Dwarkanath Mitter* and *Mohinee Mohun Roy* for Petitioner.

Baboo Sreenath Doss for Opposite party.

If, during the pendency of an Act IV case, both parties are in possession or are struggling for possession, limitation does not begin to run against either party before the time of final ejectment under the Judge's order.

In this case the review is admitted.

This suit was instituted on the 3rd of August 1861.

The plaintiff appears to have been the tenant of some land on which a factory was built; sometime about April 1860 a breach of the peace being apprehended, the Magistrate took proceedings under Section 2 Act IV of 1840, and called on the plaintiff and defendant to attend and state their claims.

On the 8th of November 1860, the Magistrate passed orders, declaring the plaintiff to have been in possession and entitled to retain possession until ousted by due course of law The defendant appealed to the Judge, and prayed an injunction to restrain the plaintiff from pulling down certain ryot's houses. On the 31st of December 1860, the Sessions Judge reversed the order of the Magistrate, and declared that the defendant was in possession at the commencement of the proceedings.

The plaintiff then brought this suit.

In the first Court the defendant appears to have waived the plea of limitation. But, on appeal, the Judge treats the Sessions Judge's decision as determining that the plaintiff was out of possession from the date of the commencement of the Act IV proceedings. But we think that this is a mistake. We rather infer that the Rajah defendant got possession of certain portions of the land, not that he had finally ejected the plaintiff who apparently remained in possession of that part of the land on which the factory was built; that, down to the time of the Judge's decision, the plaintiff remained in possession of that tenure and claimed to treat the Rajah as mere trespasser.

We are of opinion that, during the whole of the Act IV proceedings, the parties were both in possession, or both struggling for possession, it may well be that the plaintiff was not clearly and finally ejected until the Judge had decided that the defendant was in possession, maintained him in possession, and restrained the plaintiff from acting as owner. Until the plaintiff was fully and finally ejected, he was not put to his action under Clause 6 Section 23, and, therefore, time would not begin to run against him. Indeed, if this were otherwise, looking at the very short period of limitation in Section 30 of Act X, many cases might occur of violent and wrongful dispossession in which a ryot might have no time at all within which he could institute a suit to recover a possession of which he never considered himself as finally deprived, until the Judge had decided against him in the proceedings to determine the question of possession.

This case must be remanded for trial subject to these observations.

The 7th February 1865.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges*.

Limitation (Claims to Malikana).

Case No. 2668 of 1864.

Special Appeal from a decision passed by the Principal Sudder Ameen of Bhaugulpore, dated the 30*th June* 1864, *reversing a decision of the Sudder Ameen of that District, dated the* 28*th January* 1863.

The Government (Defendant), *Appellant*,

versus

Rhoop Narain Singh (Plaintiff), *Respondent*.

Baboo Kishen Kishore Ghose for Appellant.

Moonshee Ameer Ali and *Baboo Debendro Narain Bose* for Respondent.

Claims to malikhana are not barred by limitation if brought within 30 years, the Collector being held to be a depositary within the meaning of Clause 15 Section I Act XIV of 1859.

THIS was a suit for the affirmation of plaintiff's right to an 8 annas share of the malikana of mouzah Peednuggur, and to recover the amount of the same from the year 1860.

It appears from the record that the estate which was originally lakheraj was resumed by Government in 1836. The first settlement made at half jummah with the lakherajdar, was for 10 years by orders of the Board of Revenue, and this was followed by two others, each for the same period.

The plaintiff purchased the rights of the maliks after the date of the last settlement; and his claim to malikana is opposed by Government on the ground of limitation, as well as by a general denial of the plaintiff's or his vendor's rights to recover malikana at all.

The first Court held that, as no malikana had been claimed, and no right to it preferred, for 28 years after the original settlement, the claim had lapsed, and plaintiff's suit was barred.

But the Principal Sudder Ameen on appeal decided that the suit was within time, and that the plaintiff had made out his title to the malikana claimed.

The only objection taken on special appeal is that the suit is barred by limitation.

We think that the Principal Sudder Ameen was right. On turning to the record, we find that, on the occasion of the first settlement after the resumption in 1836, a certain sum on every Rupee, which was afterwards altered to 10 per cent, was first reserved as malikana, and the rental payable by the tenant (the former lakherajdar that is) calculated on the balance. The special respondent's vendor sued to establish his right to the malikana, and got a decree from the Civil Court in 1852, declaring him the rightful owner of an 8 annas share of the malikana in question, and directing the Collector to record his name in the Mutation Register. In the face of this decision—a decision of a competent Court which has never been reversed—we do not understand how the special appellant can urge that the right has been suffered to lapse. In 1852 it was declared to be in full force; and the mere fact that two successive Commissioners of Revenue chose to pronounce generally against the special respondent's claims, cannot possibly affect the question. Special respondent's vendor was declared by law to have the right to the malikana in 1852; and as this suit was instituted in 1863, there can, we conceive, be no doubt that it was within time. The question of limitation ought to have been preferred at the time that suit was instituted; and whatever defect there might have been in the malik's title on the ground of 'lapse' was cured by the Civil Court's decree, which confirmed him in his rights. Even if we were to admit the Government pleader's objection on this head, his case would be in no way benefitted, as we are of opinion that the 12 years' rule of limitation does not apply to cases like the present.

When the land was resumed, the fact of the Collector's setting aside 10 per cent as malikana allowance, shows conclusively the opinion of the authorities that that allowance was due to somebody; and that being the case, the neglect or inability of the party entitled to the allowance to enforce his rights, would not, we think, give Government the power of refusing to pay what was confessedly due, merely on the ground that 12 years had elapsed since the claim was established.

The Collector would be in such a case the depositary of the malikana allowance, and the rightful owner could sue him in that capacity, and have, under Clause 15 Section 1 of Act XIV of 1859, the privilege of a 30 years' limitation.

In no point of view, therefore, can the special appellant's contention be sustained, and we dismiss the special appeal with costs.

The 8th February 1865.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Libel—Damages.

Cases Nos. 160 and 168 of 1864.

Regular Appeals from a decision passed by the Judge of Behar, dated the 23rd February 1864.

Mirza Ekhal Bahadoor and others (Defendants), *Appellants,*

versus

Mr. R. Solano (Plaintiff), *Respondent.*

Messrs. G. S. Fagan and *R. P. Allan*, *Moonshee Ameer Ali*, and *Baboos Unnoda Pershad Banerjee* and *Dwarkanath Mitter* for Appellants.

The Advocate General and *Messrs. R. V. Doyne*, *G. C. Paul* and *A. F. Lingham* for Respondent.

Suit laid at Rupees 1,00,000.

Suit for damages for libel. The Lower Court decreed the full amount claimed, *viz.*, a lac of Rupees, which, on appeal, was reduced to Rupees 500 on the ground that, when two parties in this country litigate, the credit of either is little affected by the use of strong expressions in the petitions filed by them in Court.

THESE are two separate appeals from the same decision by the heirs of the original defendant. They are, therefore, quite identical.

Plaintiff claimed damages for a libel, laying his damages at one lac of Rupees.

The libellous matter complained of was contained in two petitions presented to the Commissioner of Patna, and the words on which libel was assigned were words of general vituperation, plaintiff being styled *ifterah-purdaz*, *bud-dianut*, *dumbaz*, and *baiman*, translated 'fraudulent,' 'unfaithful,' 'deceitful,' 'unconscientious.'

It appears that plaintiff was employed by defendant as her mooktear or agent for the conduct of certain business and recovery of certain property; but eventually the parties quarrelled, and much recrimination and litigation ensued. In consequence of the quarrel, the defendant filed with the Commissioner the petitions, the subject of suit, notifying the withdrawal of the power of attorney formerly granted to the plaintiff. In notifying his dismissal, she also thought proper to intimate that the plaintiff's bad conduct had led to that dismissal, and to use some of the vituperative expressions complained of. The plaintiff then put in a petition in which he on the other hand stated the blame to be with the defendant regarding the conduct of whose agents he used the terms '*bud-dianut*' and '*neat fasil*.' Defendant then put in the second petition going at greater length into plaintiff's alleged delinquencies, and expanding and strengthening her vituperative expressions into the strongest of those now complained of.

There was no case between the parties in the Commissioner's Court which required these recriminations. The formal withdrawal of the power of attorney was the only real business. The vituperations seems to have been mere skirmishing preparatory to more serious litigation.

The plaint was filed on 4th September 1859, and at that time alleged no special or particular damages, but was confined to the allegation of general damage.

The defendant denied that she wrote or was responsible for the petitions. She also denied that the matter was libellous, declaring the words used to be simply such as are ordinarily used "to give tone and vigor" to such papers, and she denied that any damage had resulted to the plaintiff.

The suit was thrown out on a technical point; but, on appeal, was restored and tried on the merits.

On the 12th January 1864, or upwards of 4 years after the plaint, plaintiff put in a written statement in which he, for the first time, alleged special and specific damages, *viz.*, that certain zemindars were in treaty with him to lease to him certain villages by which he would have made both direct profits and further profits by the sale and manufacture of indigo, by the loss of all which he suffered specific damage to an amount more than double the sum claimed by him.

The case was then tried and finally decided by the Judge on 23rd February 1864.

Plaintiff examined certain witnesses to prove that the farms for which he was in treaty, were lost to him in consequence of the publication of the libels complained of, and that they would have yielded certain profits stated by the witnesses. The defendant's case seems to have been very negligently conducted in the Court below, and she did little to meet this evidence. The Judge considered the plaintiff's evidence satisfactory, expressed the opinion that he had sustained damages to greater amount than those claimed by him, and decreed the whole amount claimed.

The heirs of the defendant appeal to this Court.

Their Counsel wished to urge a plea of justification set up in the Court below by another defendant not now before the Court; and, in support of this plea, wished to refer to the records of another case between the parties as establishing the truth of the libellous matter. But seeing that the appellants did not plead justification in the Court below, we refused to admit that plea in this stage of the case.

We have no doubt that the defendant Baratee Begum, is responsible for the petitions filed by her agents as hers.

We have also no doubt that the words used are libellous, and that, not being necessary, they are not privileged. The defendant, therefore, having thus libelled the plaintiff, and having pleaded no justification, must pay such damages as under the circumstances may be considered reasonable. It comes then to a mere question of assessing the damages. Now, first as regards the special damages claimed in the written statement of January 1864, and which the plaintiff sought to prove by evidence. Although in a matter of evidence we must always hesitate to interfere with a Court of original jurisdiction, still we must say that we cannot but think that the Judge has in this case taken a too one-sided view of the case, and that it is our duty very strictly to examine the grounds on which he has awarded such enormous and unprecedented damages for a libel. We find that he has taken the figures given by the plaintiff's witnesses who, more or less directly attributing the breaking off of the negotiations for the farms to the libellous petitions, state in very general terms the amount of profit to be derived from each farm. Multiplying the annual profits so stated by the number of years for which each lease was proposed, and adding the expected profits of the indigo, the Judge concludes that the damage done far exceeds the amount claimed by plaintiff. We observe that these alleged damages are not simple sums certain to be proved like bills of exchange. It is entirely a matter of opinion how far the lessors were really resolved to let the farms, how far the petitions were the cause of their declining to do so, what would have been the profit; and the mere proving by one or two witnesses in each case the loss sustained in that witness' opinion does not bind the Court to accept such statement. In all such cases, a Jury exercises the widest discretion, and so does the Court sitting without a Jury.

In this case, the European witnesses are plaintiff's agents and servants. Several of the native witnesses reside in villages held by plaintiff, and are more or less dependant on him. The evidence of the two or three witnesses not shown to be dependent on him, does not show them to occupy a very high position, and is vague and general. It seems to us to have been notorious in the country that the plaintiff and defendant had quarrelled, and quarelled in a manner and about a matter almost necessarily involving a good deal of recrimination. It may well have been that this quarrel with a person in defendant's position, would more or less interfere with plaintiff's dealings with other persons similarly circumstanced. But we are by no means satisfied that plaintiff actually lost in consequence the particular farms the subject of the special damages set forth as it were at the eleventh hour; if he did, we are very far indeed from satisfied that he lost them in consequence of the particular libellous words on which this action is founded, and not, as is far more probable, in consequence of the general and universal notoriety of the quarrel and break between plaintiff and defendant respecting his management of her affairs. If the farms were really lost in consequence of the libel, we should be very far from satisfied of the amount of damage claimed. The Advocate-General for the respondent abandoned, as we understood, the expected profits of indigo as too remote, and we have no doubt that they *are* too remote. The annual profits of the farms we do not think to be proved by the vague and general statements of these witnesses. Altogether, we think that plaintiff has entirely failed to prove the special damages claimed by him.

We come then to the general damages as originally claimed. No doubt plaintiff's position was considerable, and the words used are pretty strong. Still the words were after all of a very vague and general character, only somewhat exceeding in degree those habitually used to give what the defendants calls "tone and vigor" to such papers; and in our estimation the case is one of a very petty and trumpery character which plaintiff might very well have let alone if he had not sought to obtain, as we think, very excessive and vindictive damages. We think that the harm done to plaintiff, if harm there was, was the natural consequence of his quarrel with a person in defendant's position; and that that use of the particular words complained of in the petitions before us, would really add to that injury in an almost infinitesimal degree. When two parties in this country quarrel and litigate, the credit of either is very little affected by the use of one or two expressions more or less strong in the petitions with which they unnecessarily inundate the Courts. We consider then that, under the circumstances, plaintiff is not entitled to large damages. We assess the damages at Rupees 500, which plaintiff will obtain with costs in proportion. Respondents will pay all their own costs in all Courts.

The 9th February 1865.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Procedure—Examination of witnesses.

Case No. 275 of 1864.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Jessore, dated the 26th April 1864.

Sreemutty Ranee Doorga Soonduree (Plaintiff) *Appellant;*

versus

Ranee Huree Monee and others (Defendants), *Respondents.*

Mr. R. T. Allan and *Baboo Sreenath Doss* for Appellant.

Baboos Bungsee Dhur Sein, Bhuggobutty Churn Ghose, and *Shib Chunder Mojoomdar* for Respondent.

Suit laid at Rupees 7,171-0-0.

If the Court, when specially prayed to take the evidence of a witness, refuses without good reason to do so, the party calling the witness has ground for complaint. But the Court is not bound to examine a person as a witness *merely* because he has been summoned and is in attendance.

THIS is a suit for the possession of certain lands, on foreclosure of a mortgage by conditional sale. The Lower Court dismissed the suit, holding that the mortgage deed was not proved.

In appeal it is contended that the Court ought, on the evidence, to have held that the deed was proved; that the Court did not examine all the witnesses whom the plaintiff summoned, and who were present in Court; and that the Court wrongly refused to allow the plaintiff to put in the title-deeds of the mortgaged property which were in her possession, and which the plaintiff proposed to put in, in support of her mortgage. As regards the last objection we find that no application for leave to put in these title-deeds was made until the very day on which the case was being finally decided. Under these circumstances, the Court might very well ask, as it did, why these documents had not been produced and filed before; and there was nothing wrong in the refusal to receive them when so produced for the first time only at the last moment.

As regards the non-examination of all the witnesses present, there is nothing to show us that the Court failed to examine any witness whom the plaintiff presented for examination. It may be true that more witnesses had been summoned and were actually in Court than were examined. But the Court is not necessarily bound to take the deposition of a witness merely because he has been summoned and is present. It is clearly the duty and the privilege of the parties to call such witnesses as they think necessary to support their cases respectively. If any material witness is not examined, it is the duty of the party who deems his testimony of importance to call upon the Court at the proper time to examine him. If the Court, when specially prayed to take the evidence of a witness, refuses without good reason to do so, then, no doubt, the party calling the witness would have ground for complaint. But the Court is in no degree bound to examine a person as a witness *merely* because he has been summoned and is in attendance.

On the merits we entirely concur in the finding of the Lower Court, that the execution of the mortgage-deed is not proved, and that the suit must, therefore, be dismissed. It is needless for us to enter in detail into our reasons for the conclusion we have arrived at, as they were stated with sufficient clearness by the Lower Court.

The appeal is dismissed with costs.

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APPELLATE HIGH COURT.

No. 9.] MARCH, 1865. [Vol. II.

The 10th February 1865.

Present:

The Hon'ble C. Steer and E. Jackson *Judges.*

Onus probandi—Suit for confirmation of title—Possession.

Case No. 3075 of 1864.

Special Appeal from a decision passed by Mr. W. Ainslie, Judge of Patna, dated the 19th August 1864, *affirming a decision of Moulvie Syud Allee Hyder Khan, Sudder Ameen of that District, dated the 16th May* 1864.

Joloke Singh (Defendant), *Appellant,*

versus

Gurwar Singh (Plaintiff), *Respondent.*

Baboos Kishen Succa Mookerjee and *Chunder Madhub Ghose* for Appellant.

Baboo Mohinee Mohun Roy and *Moulvie Murhamut Hossein* for Respondent.

A plaintiff in a suit for confirmation of title is required to prove the title which he asks to be confirmed. The Court cannot give him a decree on the ground that he is in possession, and that it is for the defendant to show a better title.

THE plaintiff sues for confirmation of his possession of the property in suit in right of his purchase from Mussamut Recka who, it is alleged, succeeded to the property in right of inheritance.

The defendant pleads that he purchased the property from Mussamut Jimsa to whom in course of succession it came, and that the plaintiff's vendor was not entitled as heir to the property, and that she made no sale of it to the plaintiff.

The first Court found that the plaintiff was in possession, that Mussamut Recka did inherit the property, and that she sold it to the plaintiff. The Court also finds the purchase of the defendant from Jimsa to be false.

The Judge refuses to go into the plaintiff's title, holding that, the plaintiff being in possession, the *onus* of proving a better title rested with the defendant.

We think this judgment cannot stand. The plaintiff sues for confirmation of his title; and in such a suit, when his title is challenged, he is bound to prove it. It is impossible to say that his title to this property is good merely on the ground of possession. The case must, therefore, go back in order that the Judge may decide whether Mussamut Recka's title and the plaintiff's purchase from her is proved or not; and we may observe that it is only on the ground of these facts being proved that the plaintiff can be considered entitled to the declaration he asks for. The case is remanded.

The 10th February 1865.

Present:

The Hon'ble C. Steer and E. Jackson, *Judges.*

Appeal (on the merits)—Adoption—Evidence.

Case No. 2470 of 1864.

Special Appeal from a decision passed by Mr. H. Richardson, Officiating Additional Judge of Bhaugulpore, dated the 9th May 1864, *reversing a decision of Mr. W.*

Wright, Principal Sudder Ameen of that District, dated the 6th December 1860.

Seetaram (one of the Defendants), *Appellant,*

versus

Juggobundoo Bose (Plaintiff), *Respondent.*

Mr. T. T. Forbes for Appellant.

Baboos Dwarkanauth Mitter, Mohinee Mohun Roy, Mohesh Chunder Chowdhry and *Roopnath Banerjee* for Respondent.

The first Court dismissed the suit on the ground of limitation. The Lower Appellate Court reversed the decision on that point and decreed the suit. In special appeal it was urged that the defendant was entitled to an appeal on the merits. HELD that, under Act VIII of 1859, the decision of that Court was that of an Appellate Court from which only a special appeal lay to a higher Court.

In a former *bonâ fide* litigation to which the defendant was no party, the *status* of the plaintiff as an adopted son was in issue and disposed of in his favor. HELD that that was good evidence of the adoption in this case in the absence of better evidence for the defendant.

THIS is a suit to set aside certain sales by the plaintiff's mother during the made plaintiff's minority on the ground that there was no valid legal necessity for making such sales.

The defendant's answer was, that the plaintiff was not the adopted son of their alleged mother, and that the sales were made for the plaintiff's maintenance.

The first Court dismissed the suit on the ground of limitation.

The Appellate Court reversed the decision on this point, and found that plaintiff had sued in time. The Appellate Court then went on to decide the remaining issues between the parties; and held that the plaintiff was the adopted son as he alleged, and that the necessity for the sales was not proved.

On special appeal, it is first said that the appellant is entitled to an appeal on the merits, as the Appellate Court only had recorded a decision upon them; but, under Act VIII of 1859, the decision of that Court was that of an Appellate Court from which only a special appeal lies to a higher Court.

It is then said that the Judge has decided the issues against the defendant solely upon decisions of the Moorshedabad Civil Courts to which the defendant was no party. As to the point of limitation there was direct evidence to the disputed question of plaintiff's birth confirmed by former litigation. As to the point of adoption, it appears that the former litigation was a *bonâ fide* contest in which the *status* of the plaintiff as an adopted son was in issue, and which was finally disposed of in his favor on special appeal to the Sudder Court. This is good evidence of the adoption in this case, unless better evidence can be shown for the defendant. (*See* S. D. A. Rep. for 1859, page 550). On the point of necessity for the sale, the Judge says that he can find no evidence of any necessity. The *onus* of proving this was upon the defendant. It matters little then that the Judge went on to say that a former law-suit proved that the plaintiff's mother did not want for funds. We think none of these objections are tenable.

But looking to the delay of the plaintiff in bringing this action and to the long time which has elapsed since these sales took place, we consider that the plaintiff should receive mesne profits only from date of suit. Modifying the decision to that extent, we dismiss the appeal. The appellant will pay all the costs of this litigation.

The 10th February 1865.

Present:

The Hon'ble C. Steer and A. G. Macpherson, *Judges.*

Suit for possession—Onus probandi.

Case No. 282 of 1864.

Regular Appeal from a decision passed by the 2nd Principal Sudder Ameen of the 24-Pergunnahs, dated the 28th March 1864.

Brojokishore Mitter Mojoomdar (Plaintiff), *Appellant,*

versus

Nawab Nazir Siddhee Nazzur Ali Khan Bahadoor and others (Defendants), *Respondents.*

Baboos Mohendro Loll Shome and *Taruck Nauth Dutt* for Appellant.

Messrs. G. C. Paul, R. T. Ailan and *A. F. Lingham*, and *Baboos Sree Nauth Doss* and *Issur Chunder Chuckerbutty* for Respondents.

A having instituted a suit against C for possession of lands, gives B a lease of them subject to the contingency as his (A's) obtaining possession from the Court. A subsequently compromised the suit, not getting actual possession, but getting C, who was the ganteedar in actual possession, to acknowledge his proprietary title in consideration of his recognizing his (C's) title to possession as ganteedar. B, thereupon, sued for possession, and to eject C. HELD that, in the absence of fraud and collusion between A and C, A has got no such possession as was contemplated by him and B in their contract, and that B had no title to eject C.

THE plaintiff (who is the appellant in this Court) sues for possession with mesne profits

of lands in the Soonderbuns, claiming under a *ganteedaee pottah* granted to him by the respondent Siddhee Nuzzur Ali Khan. In 1853 a suit referred to in this case as No. 48 of 1852 was pending between Siddhee Nuzzur Ali Khan and a Mr. Terry, in which the proprietary title to these lands, amongst other lots, was in issue. The respondent Fraser (who is the agent of a Mr. McAlpine, erroneously styled in the pleadings Mrs. M. Pyne) was also a party to that suit: but Terry seems to have been the real substantial defendant. On the 18th March 1853, the plaintiff got his pottah from Siddhee Nuzzur Ali Khan. But the pottah contained a condition to the effect that, as suit No. 48 of 1852 was then pending, possession should not be given to the plaintiff until Nuzzur Ali Khan himself got possession from the Court. The suit No. 48 of 1852 was shortly after (on the 9th April 1853) compromised by Terry and Nuzzur Ali Khan, the latter not getting possession. Throughout these proceedings, and for many years previously, Fraser and those whom he represents had been in actual possession of the property; and later in 1853 Nuzzur Ali Khan instituted a suit against Fraser with the view to recovering possession from him. Mr. Fraser defended the suit vigorously, making title under a pottah from Government, setting up a perpetual junglebooree right of possession. In 1858 this latter suit was also compromised, upon the terms that Fraser should admit and recognise the rights of Nuzzur Ali Khan as proprietor; and that Nuzzur Ali Khan should admit and recognise Fraser's junglebooree right and right to perpetual possession. Ever since the compromise, Fraser has continued in undisturbed possession, as he had previously been.

The plaintiff now seeks to enforce his pottah of 1853, and to obtain possession with mesne profits. The defendants, among other defences, plead that under the pottah the plaintiff was entitled to possession only on a contingency, which has not occurred, *viz.*, on Nuzzur Ali Khan obtaining possession of the property from the Court. Nuzzur Ali Khan further submits that the pottah is void, having been granted for an illegal consideration, that is to say, in order to induce the plaintiff to give evidence in his favour in a suit pending in the Supreme Court. The Lower Court held that the plea as to the consideration was proved, that the consideration was illegal and the pottah void. The plaintiff's suit was accordingly dismissed. Hence the present appeal.

We are of opinion that the decree of the Lower Court ought to be confirmed, and we are of this opinion quite independently of any question as to the pottah being void or being granted for an illegal consideration. The pottah was to be of no effect so far as getting possession was considered, except in the event of Nuzzur Ali Khan getting possession. But he never did get possession, certainly no such possession as made it possible for him to give effect to the pottah. It is said he had no right to compromise; and that the compromise was collusive. But the attempt to prove collusion or fraud between the defendants as against the plaintiff has, we think, wholly failed. There is nothing in the evidence before us (which includes the proceedings of the former suits) to lead us to suppose that, if Nuzzur Ali Khan had prosecuted those suits to judgment, he would have got a decree for possession, or would have otherwise been in a better position than he is now. Moreover, whatever might be the liabilities of Nuzzur Ali Khan under the pottah, the plaintiff certainly would not be entitled to specific performance of the contract contained in it as against Fraser and, this suit is, in fact, one for specific performance by ejecting Fraser. Mr. Fraser's possession is on the evidence perfectly *bonâ fide*, and without notice of the plaintiff's pottah. It is attempted to fix him with notice of the pottah by showing that Nuzzur Ali Khan, in the suit No. 48 of 1852, filed a petition in which he stated that he had given the pottah. But there is nothing to show that this petition ever came to the actual knowledge of Mr Fraser; and we are by no means prepared to lay down as a rule that every party to a suit is to be necessarily deemed to be affected with notice of facts, merely because they are mentioned in petition which have been filed in the progress of the suit, more specially if those petitions are irrelevant to the matter in issue between the parties, as the petition was in the case. But we do not think that it would have made any difference if it had been proved that Fraser knew of what had passed between the plaintiff and Siddhee Nuzzur Ali Khan. Fraser had long been in possession and he got his prior possession as ganteedar, confirmed by Siddhee Nuzzur Ali Khan for a valuable consideration, *viz.*, his admitting the disputed proprietary right of Siddhee Nuzzur Ali Khan. He was only

maintained in the position which he has always held, and his right to hold which he had always asserted: and it appears to us that, equitably and otherwise, his title is better than that of the plaintiff. The agreement to put the plaintiff in possession implies the power on the part of Siddhee Nuzzur Ali Khan to turn Fraser out; but it is not shown that Siddhee Nuzzur Ali Khan ever had any such power, and the plaintiff clearly can have no power to do that which Siddhee Nuzzur Ali Khan could not have done.

In every view of the case, we are of opinion that this appeal must be dismissed with costs.

The 10th February 1865.

Present:

The Hon'ble G. Campbell and F. A. Glover, *Judges.*

Sale by widow—Protest by reversioners—Onus probandi.

Case No. 3022 of 1864.

Special Appeal from a decision passed by Mr. A. Davidson, 2nd Principal Sudder Ameen of Hooghly, dated the 11th July 1864, reversing a decision of the Moonsiff of Serampore, dated the 19th May 1863.

Moonshee Casseemuddeen Ahmed (Plaintiff), *Appellant,*

versus

Ram Doss Gossain (Defendant), *Respondent.*

Mr. R. E. Twidale for Appellant.

Baboo Obhoy Churn Bose for Respondent.

The mere admission by a debt of the husband as the cause of the sale of the property is not (on the face of a recorded protest by the reversioners) evidence that the debt really was the husband's. It lies on the purchasers to prove that it was so.

We do not think that the Principal Sudder Ameen has tried the issues in this case as he ought to have tried them. There is, in fact, no trial by him. His finding merely amounts to this, that, whether the sale be good or bad, the defendants are entitled to retain possession during the life-time of the widow. We think that, the case having gone so far, the Courts below were bound to find on the evidence whether the sale was good or bad as a sale of the rights of the husband. And since, if the debt was not the debt of the husband, the conduct of the widow would amount to a grossly fraudulent and collusive attempt to alienate the property from the reversioners, we thimk that such fraudulent waste would entitle the reversioners to take possession at once.

Further, if it were necessary, there is some strong evidence that the widow's avowal of unchastity which the Principal Sudder Ameen was bound to consider; but under our view, whichever way the former issue be decided, this will not be necessary.

We agree with the first Court in thinking that the mere confession by the widow of a debt of the husband is not, on the face of a recorded protest by the husband's relations, evidence that the debt really was the debt of the husband. It lies on the defendant to prove that it was so. The Court below will find in the case as thus put, whether in truth the debt for which the property was sold, was or was not the debt of the husband? If it was, the decision will be in favor of defendant. If it was not, plaintiff will have a decree for immediate possession.

The 11th February 1865.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Appeal (by one defendant)—Reversal of entire decree

Case No. 3024 of 1864.

Special Appeal from a decision passed by Baboo Grish Chunder Ghose, Principal Sudder Ameen of the 24-Pergunnahs, dated the 12th July 1864, reversing a decision passed by the Additional Moonsiff of that District, dated the 18th April 1863.

Woomesh Chunder Bose (Plaintiff), *Appellant,*

versus

Matumginee Debia and others (Defendants), *Respondents.*

Baboo Obhoy Churn Bose for Appellant.

Mr. A. Sevestre for Respondents.

On the appeal of one defendant having only a past interest in a decree, the entire decree cannot be reversed.

The plaintiff sues for possession after foreclosure of certain mortgaged properties. The original mortgagors were Kishto Chunder and Kala Chand, each representing an 8 annas share.

Kishto Chunder, it apears, had three sons, one Paresh Nath, who is of age, and two, who are minors, under the guardianship of their mother, Matumginee.

The Court of first instance gave the plaintiff a decree. Kala Chand and Paresh Nath did not appeal. The widow, Matumginee, appealed on behalf of the two minor sons of Kishto Chunder, making Paresh Nath a respondent.

The Lower Appellate Court, on the appeal of Matumginee, who represents only two-thirds of the estate of Kishto Chunder, has reversed the decision of the Court of first instance over the whole of the 8 annas, the share of Kishto Chunder in the mortgaged property.

This is clearly wrong. Paresh Nath did not appeal, and the appeal of Matumginee was restricted to two-thirds of the property. This is clear from the fact of her making Paresh Nath, who was content with the decision of the Court of first instance, a respondent.

The decision of the Lower Court must be amended with costs.

The 13th February 1865.

Present:

The Hon'ble W. S. Seton-Karr, and Shumbhoonath Pundit, *Judges.*

Possession—Resumption.

Case No. 177 of 1864.

Regular Appeal from a decision passed by Lieut. R. Money, Deputy Commissioner of Pooroolia, in the District of Maunbhoom, dated the 17th February 1864.

Maharajah Neelmoney Singh Deo Bahadoor (Plaintiff), *Appellant,*

versus

Rajcoomaree Thakooranee (Defendant), *Respondent.*

Mr. R. T. Allan and *Baboo Suggadanund Mookerjee* for Appellant.

Baboos Baney Madhub Banerjee and *Kishen Succa Mookerjee* for Respondent.

The plaintiff having failed to prove that he or his ancestors received any rents for the lands in dispute before or after the dismissal of his ancestor's claim for rents in 1803, or that he ever held the village in *khas*, his claim to possession of the lands in dispute as *khamar* lands of his zemindaree was dismissed.

There being no proof of the village having been given for maintenance to the ancestors of the defendants, nor of the time or terms of the alleged grant, no action for resumption was held to lie.

The appellant, the present Rajah of Pachete, on the 5th February 1863, sued (1) Raj Coomaree Thakooranee, the widow of Bhoopaul Deo, as the real, and (2) Haradhun Doss as a formal defendant, for recovery of possession of mouza Domerkola, valuing the suit at 18 times the sum of Rupees 480, the alleged annual produce of the lands in dispute.

The allegations in the plaint are that the mouza in question is a portion of the *khamar* lands of the zemindaree settled with the predecessors of the plaintiff; that it was formerly given for maintenance to the aforesaid Bhoopaul Deo; that, on his death, the plaintiff, by virtue of the authority possessed by the members of the family who successively succeed to the Raj, resumed the possession of the village, and collected the rents himself and through farmers; that, in 1259, while the village was in the khas possession of the plaintiff, it was included in a putnee given to the formal defendant, who accordingly collected the rents due to him from the village; that, in a suit collusively instituted between the said putneedar and the defendant No. 1, it was decided that the village was the Mohatran lakheraj of the said defendant; that the defendant No. 2 then brought a suit to obtain an abatement, on the ground of the exclusion of the aforesaid village from his putnee, and in September 1860 obtained a decree; and that, owing to these proceedings, the plaintiff has lost his possession of the village in dispute.

The prayer of the plaint is to try and declare that the said village is a portion of the mâl lands of the plaintiff's zemindaree; and that the lakheraj title set up by the defendant may be set aside and possession awarded to the plaintiff.

The defendant pleads that the village in question is her ancestral lakeraj acquired long before the accession of the British Government; that it was not given for maintenance to her husband, who, and whose ancestors, had all along held the same rent-free until 1209, when the ancestor of the plaintiff sued the husband of the defendant for Rupees 251 as the rents of 1208; that in this case her husband denied the title of the plaintiff suing him and pleaded lakheraj tenure; that the said ancestor of the said plaintiff having failed to prove his case, the suit was dismissed with a direction to try his claim or title in a regular suit; that, since that time up to the filing of this present plaint, the husband of the defendant, and after his death the defendant, have remained in possession as before; that intermediately the plaintiff sued one Degumbar Biswas for the enhancement of the rents of the village;

that in that case the lakeraj title of the defendant being established, the claim of the plaintiff was dismissed; that the plaintiff then, though not in possession, let out the village in putnee to Hara Dhun Sircar; that this talookdar brought an action for enhancement against one Puddolochun Missur who was alleged to hold the village in farm, and also instituted a case for possession of the village; that these cases were dismissed on proof of the rent-free title of the defendant; and that subsequently on the suit of the talookdar for abatement and return of a portion of the consideration money, it was decided against the plaintiff that the mouzah in dispute was the lakheraj property of the defendant.

On the 17th February 1864 the Lower Court dismissed the case of the plaintiff, on the ground that he had failed to establish that he or his ancestor ever held possession of the village for the last 60 years from the year 1803, when the claim of his ancestor to obtain certain rents of the village brought against the husband of the defendant, was dismissed for want of proof.

Against this decision the plaintiff has appealed. Now, if this case be considered simply as one for possession of an invalid rent-free grant alleged to have been granted subsequently to 1790, the plaintiff is, with reference to Clause 14 Section 1 of Act XIV of 1859, out of time. The rent-free grant, even if made for maintenance, may perhaps be as good a grant as one for any other purpose, and might, if made after 1790, have been resumable by the plaintiff at any time under Section 10 of Regulation XIX of 1793, as long as the *nullum tempus* Clause of that Section remained in force. Any such grant cannot, however, now be allowed to be resumed by the plaintiff. The plaintiff, however, wants to treat this rent-free holding as something apart and distinct from ordinary lakheraj grants, and this point especially is noticed below.

We do not think it proper to decide against the present claim of the plaintiff, on the ground of the legal impropriety of the plaintiff urging this claim after his putneedar in a regular case, perhaps in the presence of the plaintiff himself, failed to prove that the village was a portion of his mâl lands, and after it was finally decided, in another regular suit against him, that his putneedar was entitled to obtain an abatement on the ground that the plaintiff had no right to include this village within the putnee granted by him to that putneedar. These decisions are no bar to the plaintiff's present action.

It is evident that the allegation of the plaintiff that his ancestor received any rents for the village before and especially subsequent to the dismissal of the rent-suit in 1803, or that he took possession of the village at any time, is unsupported by any proof. Certain documents were filed below to support this allegation, but no step was taken to prove these papers. Most of them do not appear to have any thing to do with the property in question; and with regard to others, irrespective of the fatal objection that some of them, though required to be on stamps, are not written on such paper, we cannot see how, even if admissible, they would be evidence against defendant No. 1. Even if these papers were to be received as evidence against this defendant, we do not understand that they would carry the case of the plaintiff beyond showing an ostensible title in his favor recorded in certain papers connected with his estate, over the preparation of which he could have all manner of control, though, as an actual fact, possession of the property in dispute might remain with another party.

The only proof that the plaintiff has given of the allegation mentioned in his plaint amounts to this, that the name of the village appear in the quinquennial papers connected with his estates, at an annual sudder jumma of Rupees 125. Giving the utmost weight to this piece of evidence, it simply shows that the village was asserted by the ancestor of the plaintiff, when these papers were filed, as included in the settlement of the estate. If plaintiff now wants to sue for recovery of possession, he must show he is not barred by limitation, and must prove his allegations regarding possession and dispossession. The village in dispute, plaintiff says, was given for maintenance to the husband of the defendant. Defendant denies that fact; and there is no proof of when it was given, under what terms, for maintenance to what person, and, if to the husband of the defendant, whether rent-free or otherwise. The plaintiff does not attempt to explain how it is, if the village was given for maintenance to the husband of the defendant and resumed after his death, that plaintiff's ancestor claimed rent so far back as 1803 from the husband of the defendant; and how it is that the plaintiff in a case for rent instituted by the defendant No. 1, against a tenant of hers who denied the title of the said defendant (a case decided by the Moonsiff of Chalnah, 1854, and in

which the plaintiff was an intervenor) he described the village to have been the chakeran of the said Bhoopaul Deo in lieu of service, and did not state that he had resumed it after the death of the said Deo, as was alleged by the said tenant, but asserted that he had resumed it on the said Deo having defaulted in the discharge of his service.

In the plaint filed in 1803, the ancestor of the plaintiff had described the property now in dispute as in the *zimma* or trust of the said husband of the defendant, who, it was said, had refused to pay the rents that he was hitherto paying, while the said husband of the defendant, in his answer, pleaded that the village was his ancestral rent-free grant. In the above mentioned case decided by the Moonsiff of Chalnah, the property was also said to have been in the *zimma* of the said Bhoopaul.

Now, either the grant, if made for maintenance, was on condition of paying certain rents, or it was entirely rent-free. To be consistent, the plaintiff must say that some rents were reserved to the Rajah of Pechete. Now, in such a case the amount of the rents, if imposed, must have been merely nominal; but the rents claimed in 1803 do not appear to have been of that kind. The amount claimed was Rupees 250 a year, more than half of the alleged annual income. Besides, there is not even proof to support the allegation that the annual produce is about Rupees 480, even assuming that sufficient margin was left for maintenance afterpaying the rent reserved to the Rajah of P achete. The fact of no rents being proved to have been ever realized if not even before that litigation, at least from the year 1803, or for 60 years, would, it is said, give some right to the defendant to plead that she and her husband have at least from the time of withholding the rents, held adversely to the plaintiff's family. The plaintiff, in the present case, wants to ignore the fact of the litigation of 1803, and of the facts then pleaded on each side. Assuming that he can be permitted to do so, it is clear that the plaintiff must prove that the village was given for maintenance to the said husband of the defendant, and is such as he has a right to resume after his death. In proof of this he relies upon a copy of a plaint in a summary suit by the husband of the defendant filed by his mooktear against a ryot under him, for arrears of rent in which paper the said husband of the defendant is made to say that the village, of which the defendant in that case was one of the tenants, is his " maintenance *(tahood)* lands." This assertion was inserted by the mooktear of the husband of the defendant in a case of which the matter now in dispute was not at issue, and after the said Bhoopaul had openly denied the title of the plaintiff's ancestor. The expression after all may mean that the property now in dispute was something quite different from what the plaintiff must establish in this case before he can ask for a decree.

The plaintiff pleads certain decisions of the late Sudder Court, one of them upheld by Her Majesty's Privy Council, ruling that maintenance given to the members of the family of the Rajah of Pachete is not binding upon the next successors, and terminates with the life of the grantor. There is no proof here of the husband of the defendant being a member of the family of the plaintiff; and the argument submitted by the pleader of the plaintiff that no other inference can be drawn from the fact of a family custom being pleaded, is answerd by a reference to another case of the plaintiff decided against him in 1853. In this case, though the tenure which was asked to be resumed was one given to a stranger to the family, the right under which the suit was brought was the self-same *coolachar* which is pleaded here, with this difference that the maintenance grant is not said to terminate with the life of the grantee. In the case decided by the Moonsiff of Chalnah it was asserted by the plaintiff that the said Deo was a (distant) connection of the plaintiff serving under him, which designation would not represent the " member of the family" alluded to in the decision of the Sudder Court, dated 14th of April 1834, page 392 to 399.

It is unfair to decide this case in the absence of any reliable proof produced by the plaintiff, simply by stretching the supposed admission beyond the bare words used in the said plaint for rent filed on behalf of the said Bhoopaul; and the plaintiff is not authorized to ask for the resumption of any maintenance grant, whatsoever without showing its nature and conditions, and the relationship of the party to whom it may be said to have been originally granted. If the grant for maintenance was without any rents, then if plaintiff's ancestor had, as he said in 1803, all along subsequent to 1803, and also from a time previous to that year, received rents from the husband of the defendant, the maintenance grant must have been made to some other person *before*, and the grant must have been resumed before the said husband of the defendant became

liable to pay the heavy rents which were demanded from him in 1803, and which, for subsequent years up to the death of the said Deo, are attempted to be shown at a much smaller rate, as either paid, or acknoweldged as due, by the said deceased Thakoor, or as received from others.

We can understand the nature of a right in a Rajah of Pachete when he says, "I am not bound by any grant of maintenance made by my predecessor," and says so within a proper time after his acquiring the Raj. But we do not read the former decisions of the Sudder Court or the decision of the Privy Council to rule that, though the party in possesion or his ancestor may have denied the assertion of the property being given for maintenance repeatedly in the presence of the preceeding Rajah, though he or even his predecessor may have delayed to sue in time to set aside the adverse title set up by those in possession, yet that the present Rajah acquires any new right to re-open the question of resumption, notwithstanding that the defendant and his ancestor may have held for more that 60 years before the present suit. Neither of the said decision quoted by the plaintiff, nor the former, nor the present limitation law allows any such authority to any Rajah of Pachete.

The Judge further recorded correctly in his decisions "that the copies of the decisions filed by the defendant, more especially the decision of the *Chalnah* Moonsiff "in 1854 (which alludes to former cases so "far back as 1831), show that, from that time "to the present date, decrees have always "been given in favor of the defendant and "her ancestor for the rents of this mouzah "notwithstanding that the plaintiff claimed "as his mâl:" and that the papers filed by the defendant in these cases are no longer forthcoming as the records were burnt during the mutiny.

There is no proof of any collusion between the defendant No. 2 and defendant No. 1. If there be any ground to suspect any collusion, it may be suspected to exist between the plaintiff and defendant No. 2.

The attempt made by the plaintiff to injure the position of defendant No. 1 by suits brought by him or for his benefit preceding the present suit further afford good ground for believing that the present action is not the first instituted by the plaintiff to injure the rent-free rights of the said defendant.

We accordingly uphold the decision of the Lower Court and dismiss the appeal with costs.

The 13th February 1865.

Present:

The Hon'ble C. Steer and E. Jackson, *Judges.*

Case No. 2737 of 1864.

Review of Judgment (Exposition of the law of, for the guidance of Judicial Officers).

Special Appeal from a decision passed by Baboo Nobinkishen Paleet, Principal Sudder Ameen of Backergunge, dated the 24th June 1864, *reversing a decision passed by Moulvie Somenooddeen Khan Sudder, Ameen of that District, dated the* 19*th February* 1863.

Shumsheir Ali Khan and others (Plaintiffs), *Appellants,*

versus

Ram Chunder Goopto and others (Defendants), *Respondents.*

Baboo Hem Chunder Banerjee for Appellants.

Baboos Kalee Mohun Doss and *Romesh Chunder Mitter* for Respondents.

It is not competent to a Court, when the application for a review of judgment is based on the discovery of new evidence, to dispense with proof that the new evidence has come to the knowledge or the reach of the applicant since the first hearing; and if a Court does re-hear a case when an application has been granted without such proof, it is a valid ground of appeal, both regular and special, that the judgment arrived at upon the review has been arrived at contrary to law.

Except on some clear and palpable error committed by the predecessor, no Judge is competent to reverse the decision of his predecessor as a matter of fact on the self-same evidence (Steer, J.).

Mr. Justice Jackson.—THE plaintiffs preferred this suit to recover possession of three howalas and a neem howala. Their allegation was that these properties had belonged to them in the *benamee* of Shadoo Churn Lushker; but had, during their absence from the country, been taken possession of by the defendant, the zemindar. The defendant, in answer, alleged that he had in the *benamee* of one Shib Sunker purchased the properties from Shadoo Lushker to whom they had belonged.

Both the first Court and the Principal Sudder Ameen, who first tried the case on appeal, were of opinion that the plaintiff had proved his allegations and decreed his claim. Another Principal Sudder Ameen, Baboo Nobin Kishen Paleet, having taken the place of the first Principal Sudder Ameen, an application for review of the judgment passed by his predecessor was

made, and a review was admitted. No grounds for the admission are detailed in the proceeding, admitting the review; but the Principal Sudder Ameen records only that he deems it right to admit it. There appears to have been an additional piece of evidence tendered with the application for review. The Principal Sudder Ameen, on reviewing the evidence which had already been considered by his predecessor, as well as the additional evidence put before him, has come to the conclusion that the plaintiff's case is proved to be false by the admissions made by one of the plaintiffs as shewn by the additional evidence. He has accordingly reversed the judgment of his predecessor and dismissed the plaintiff's suit.

On special appeal, it is said that the Principal Sudder Ameen has altogether misconstrued the additional evidence so put in, which not only does not contain any such admission as is alleged, but does not in any way prove the defendant's case.

The evidence is a kubooleut, which was tendered by one of the plaintiffs to a co-sharer, in the zemindaree with the defendant. In this he states that a butwara has taken place between Shib Shunker and the co-sharer, and that certain lands which he holds has fallen into the share of Shib Shunkur. The Principal Sudder Ameen records that these words contain an admission that the defendant, Ram Kanai, purchased the howalas, now in suit, in the name of Shib Shunkur. The respondent's Counsel contends that it is an admission of Shib Shunkur's proprietary title, inasmuch as no objection is then taken to the title.

We are of opinion that the Principal Sudder Ameen has altogether misconstrued this document. In the first place, it contains no admission as to Ram Kanai's purchase at all. In the second place, it contains no admission as to Shib Shunkur's purchase or as to his title. It makes no allusion to title. It alludes to a butwara which had taken place between the co-sharers in the zemindaree, and mentions Shib Shunkur as being one of the parties to that butwara, and alludes to certain land as having fallen with his share. It is admitted that Shib Shunkur was then in possession, and the plaintiff, in giving that kubooleut, simply treated him as in possession.

We think that this misconstruction of this document has led the Principal Sudder Ameen completely wrong in this case. And as the rest of the evidence was weighed and considered by the first Principal Sudder Ameen, and upon it the plaintiff's claim held to be proved, we reverse the decision of Baboo Nobin Kishen Pareet, and confirm that of the first Court. The defendant will pay all the costs of this litigation.

Mr. Justice Steer.—When a Court grants a review, there is no power in any other Court to say that the review must not be granted and the case re-heard. The order is final. But when the Court granting the review, proceeds to re-hear the case, and disposes of it, the law of appeal applies to the decision.

In the present case, then, when the Prinpal Subder Amoen granting a review from the decision of his predecessor, reversed it on the re-hearing, one question which arises is, did the Principal Sudder Ameen dispose of the case on re-hearing according to law; or in other words, did he arrive at his judgment on the re-hearing conformably to law?

It will be seen from the judgment of my colleague, in which I quite coincide, how egregiously wrong the Principal Sudder Ameen was in the view he took of the new document upon which he thought proper to grant the review. Clearly, the production of this document did not advance the case for the defendant one jot further than it stood at the time of the first trial. Therefore the Principal Sudder Ameen, in reversing the decision of his predecessor, has, in effect, sat in judgment upon the merits of his predecessor's judgment, and declared his conclusions wrong upon a matter of fact on the self-same evidence which was before his predecessor.

Now, it seems to me that it is very advisable in the ends of justice that an early opportunity should be taken to set Judical Officers right, in regard to the use of the very large discretion which the law is thought to invest them in regard to the admission and disposal of applications for reviews. The present case affords, I think, that opportunity, and I am glad to avail myself of it.

The law allows a Judge to review his own judgment or the judgment of his predecessor on any sufficient ground. But if the ground of the application is the discovery of new evidence, it is a condition precedent to the acceptance of that evidence that the applicant for review satisfy the Court that the new evidence sought to be adduced was not within his knowledge, or could not be adduced by him at the time of the first trial. Unless, at the time of granting the review, the Court is satisfied that

the new evidence could not have been adduced at the first trial, the application is not legally granted; and it will be ground for a regular appeal or a special appeal, that the case was re-heard in violation of the Law of Review, which requires that a certain state of things should be shown before an application for review can be complied with.

It is not competent to a Court, when the application is based on the discovery of new evidence, to dispense with proof that the new evidence was not within the knowledge or the reach of the applicant at the time of the first hearing; and if a Court does re-hear a case when an application has been granted without such proof, it is a valid ground of appeal, both regular and special, that the judgment arrived at upon the review has been arrived at contrary to law.

This is one of the grounds on which I think the judgment of the Principal Sudder Ameen in the case before us is open to objection; and another is that, inasmuch as the new evidence put in, was really no evidence at all, the Principal Sudder Ameen decided the case directly adverse to the view arrived at by his predecessor on one and the self-same evidence. The Law of Review never intended that a Principal Sudder Ameen should hear an appeal against the judgment of his predecessor in the same office; and it seems to me that any officer who allows a review and decides a matter of fact upon the same identical evidence as that on which his predecessor decides the case, wholly misapprehends the Law of Review, and that it is not a proper ground within the meaning of the law for the admission of the review, nor a proper ground to decide upon, that the evidence as laid before the predecessor, and which inclined him to decide one way, leads his successor to an exactly contrary conclusion. Where a Judge has so misapprehended the intent of the law, and has constituted himself an Appellate authority over his predecessor, I should hold that to be a valid ground of appeal; and I should not hesitate to set aside such an unwarrantable judgment.

Except on some clear and palpable error committed by the predecessor, no judge is competent to reverse the decision of his predecessor on a matter of fact on the self-same evidence. If then, when any new evidence is adduced as affording a ground for preferring an application for review, the Judge finds that the new evidence tendered is not sufficient *per se* to show that the decision of the predecessor is wrong on the matter of fact, or that the new evidence, if thrown into the scale, would not create an overpowering balance of evidence, on the side of the party on whose behalf the application for review is made, the Judge's proper course is to refuse the application. If he does grant a review on new evidence upon which, according to the above view, he should not have granted a review, and he proceeds to review the former evidence and to reverse the decision of his predecessor on that evidence, he commits two errors, which, on regular appeal or special appeal, a higher Court would be bound to take notice of; and where a former judgment has been reversed in such an unlawful manner by a subsequent judgment, the proper mode of dealing with the subsequent judgment in appeal, would be just to blot it out of the record.

If these views which I hold, are not correct (and from this I do not mean to cast any doubt upon my own opinion), then the decision of the Principal Sudder Ameen in the present case shows what an absolute necessity there is that the Law of Review should be amended. If there is no power, by way of appeals, to check the Lower Courts from improperly granting applications for review, and from taking up and upsetting the decisions of their predecessors, then most assuredly the law should be altered to provide against such an arbitrary power dangerous in the hands of any one, and most mischievous in the hands of a vast number of men whom daily experience shows that they do not know how to use it.

The 14th February 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Hindoo Law—Succession (Married daughters).

Case No. 248 of 1864.

Regular Appeal from a decision passed by Mr. J. F. Hewit, Deputy Commissioner of Lohardugga, dated the 17th September 1863.

Binode Koomaree Debee (Plaintiff), *Appellant,*

versus

Purdhan Gopal Sahee and others (Defendants), *Respondents.*

Baboos Kishen Kishore Ghose and *Kedarnauth Mojoomdar* for Appellant.

Mr. C. Gergory and *Moulvie Murhumut Hossein* for Respondents.

Suit laid at Rupees 10,000.

Married daughters are not excluded from succession by either the *Dyabhaga* or *Mitakshara*.

THE plaintiff, as the legal heir of the deceased Gobind Singh, sues to recover possession of her father's ancestral property, Pergunnah Nama Deek, a dependency of the Chotâ Nagpore Raj. She alleges that her father, Purdhan Gobind Singh, having inherited the property, died on 29th September 1831 (14th Assin 1248 B. S.), leaving as heirs his two widows, Sheeb Koomaree, mother of the plaintiff, and Soogun Koomaree and his daughter, the plaintiff, and two sons, Gopal and Dul Gobind; that her mother succeeded to the property under the Law of Inheritance current in Bengal; but owing to her dislike to her daughter the plaintiff, and her children, she made over the property to Moneenath Sahee, a distant relation of the family, from whom she received a payment of malikana and continued in possession till her death on 31st May 1852 (19th Joisto 1259 B. S.); that under the law of the *Dyabhaga*, by which succession in the family is governed, the plaintiff is entitled as the nearest legal heir, to succeed to the property after her mother; that she is prevented from taking possession by the defendant Purdhan Gopal Sahee, son of Moneenath Sahee, and she, therefore, brings this action to obtain possession with mesne profits.

The defendant pleads limitation and family custom, by which the eldest son succeeds to the exclusion of the other sons who received maintenance; that, on failure of direct male heirs, the inheritance goes to the collateral male branches, and the brother or brother's sons succeed to the exclusion of all females; that, on the death of Purdhan Gobind Sahee without male issue, the inheritance came to Moneenath Sahee, father of the defendant, the nearset male heir, who has confirmed in possession by the decision of Captain Wilkinson, Agent to the Governor-General in 1833.

The case was dismissed by the Deputy Commissioner, on the ground that the question between the parties had been disposed of by Captain Wilkinson in 1833. From this decision, an appeal was preferred to the late Sudder Court, and in the month of August 1862, the order of the first Court was reversed by the High Court, and the case was remanded to enable that Court to enquire into the right of the plaintiff to succeed to the property, the decision of Captain Wilkinson being considered as no bar to the investigation of this point.

The case was again heard by the present Deputy Commissioner or Collector on 17th September 1863, and he dismissed the suit for the following reasons: that the family is governed by the *Mitakshara* Law; and, under it, a married daughter cannot succeed to her father's property. Further, that plaintiff, in another suit brought by the Raja of Chotâ Nagpore for the resumption of these lands, waived her rights to the property in favor of her son Gopal Singh, and, therefore, she is estopped from making the present claim.

We do not concur in the reasons assigned by the Judge below for dismissing the suit, though we are satisfied that his order of dismissal is the proper order to be passed, but on other grounds than those given by the Lower Court. Whether succession be governed by the Law of Bengal (the *Dyabhaga*) or by that of Benares (the *Mitakshara*), married daughters are not excluded from succeeding by either of these Laws. By the Law of Bengal, the unmarried daughter is first entitled to inherit: if there be no maiden daughter, then the daughter who has, and the daughter who is likely to have, male issue, are together entitled to the succession. Daughters who are barren, or widows without male issue, or mothers of daughters only, can, under no circumstances, inherit. By the Law of Beneras, preference is given to the maiden daughter; failing her, the succession devolves on the married daughters who are indigent, to the exclusion of wealthy daughters who succeed in default of indigent daughters. But no preference is given to a daughter who has or is likely to have male issue, over a daughter who is barren or a childless widow. It is evident, therefore, that the Judge was wrong in supposing that a married daughter could not succeed.

The second reason assigned by the Judge is also incorrect, for any thing that plaintiff may have said in a petition filed in another case, to the effect of her being guardian of her son who is entitled to succeed, can be no estoppel to any right that she may have to the property as against a third party holding adverse possession, the more so when such statement has been rendered nugatory by a decision of the Sudder Court, which declared the son incapable of bringing an action during the life-time of his mother and

grandmother. The plaintiff seeks to recover possession after the opposite party have been in undisputed possession for more than thirty years. She alleges that the succession to this property follows the Law of Inheritance current in Bengal; that her mother was in possession, but, from ill-will to her and her children, allowed a member of a collateral branch of the family to be declared the proprietor and to succeed to the possession, receiving malikana from him. And she pleads that during the life-time of her mother, she was not in a position to bring this action, and that her mother died in 1852, from which date her suit is within time.

From the plaintiff's own statement, we find that her allegation as to the course of succession to this property is incorrect, for, in the genealogy which she recites, she says that, on the decease of Purdhan Nurput Sahee, his eldest son Purdhan Kishen Churn Sahee, pursuant to the usage of the country, came to the undisputed and sole possession of the Raj as rightful proprietor of the entire Pergunnah Nama Deek. His second brother, Purdhan Gopee Churn Sahee, and his third brother Purdhan Sham Churn Sahee, died without issue. The fourth brother Purdhan Churn Sahee, grandfather of Monee Nath Sahee, having separated from commensality, received a separate jagheer for his maintenance. Now, this statement shews unmistakeably that succession to this property did not follow the Law of Inheritance current in Bengal, as laid down in the *Dyabhaga*, but rather that there was a family custom by which the eldest sons succeeded to the exclusion of the others as averred by the defendant. Then it is alleged by the plaintiff that her mother was in possession of the property; but she has given no proof whatever of such possession; and even if her mother had, as she declares, taken steps to deprive her of the inheritance, yet the other widow of Gobind Sahee was not likely to give up her rights to the property, and yet we hear nothing of her possession and enjoyment. Again, it is not probable that, if the widow of the deceased Gobind had been entitled to retain possession during her life-time, she would have waived her rights in favor of a distant relative to the injury of her own children, for the Court can find no proof of the ill-will said to have existed between the mother and daughter; nor do we think it at all likely that, had the plaintiff's mother succeeded to actual possession, she would have been deprived of it by the Governor-General's Agent in 1833. On the whole, therefore, we think that plaintiff has entirely failed to make out her case. Her own admissions prove that the course of inheritance is not governed by the law current in Bengal, and in support of her other allegation she has not given a shadow of proof. We dismiss the appeal with all costs and interest thereon from the date of decision to date of realization.

The 14th February 1865.

Present:

The Hon'ble C. Steer and E. Jackson,
Judges.

Deceased Naibs (Misfeasance of)—Civil remedy.

Case No. 2479 of 1864.

Special Appeal from a decision passed by Mr. C. S. Belli, Judge of Rajshahye, dated the 26th May 1864, *affirming a decision passed by Mr. W. Wright Principal Sudder Ameen of that District, dated the 24th September* 1863.

Ranee Surnomoye (Plaintiff), *Appellant,*

versus

Dwarkanauth Ghose (Defendant), *Respondent.*

Baboos Juggadanund Mookerjee and *Sreenath Doss* for Appeellant.

Baboo Mohinee Mohun Roy for Respondent.

The plaintiff's Naib (now dead) sent her a Hoondee (found by the first Court to have been a forgery) on account of collections from her estates, which Hoondee was on presentation accepted but finally dishonored. HELD that she has a cause of action; that she has, if she can prove her case, suffered a direct injury to the extent she alleges; and that she is entitled to redress.

THE plaintiff, Ranee Surnomoyee, sought, in this action, to recover Rupees 1,000 with interest. She alleged that her naib, Tiluk Chunder Dutt, had collected that sum from her estates and had transmitted it to her by a hoondee which was, on presentation, accepted, but finally dishonored. The plaintiff sued not only the drawer and acceptor of the hoondee, but also the widow of the naib who had since died, and the naib's sureties.

The Principal Sudder Ameen found that the hoondee was a forgery, and decreed the claim against the widow of the naib, but absolved the sureties and the other defendants.

The plaintiff appealed to the Judge; and on the appeal, the naib's widow, being a respondent, put in her objections, and the Judge

held that, as the action had been brought, the plaintiff could not succeed at all; that "either the hoondee was a genuine instru-"ment, in which case only the drawer and "acceptor were responsible, or the deceased "naib has been guilty of embezzlement, and "his representative after his death cannot be "held civilly liable for loss accruing through "that offence, unless it had been established "against him in a criminal prosecution. "Broom's Commentaries, page 97."

The plaintiff, on special appeal, urges that the Judge has erred in law; that the plaintiff has a cause of action against her naib's estate for the special injury to which she has been subjected by his wrong acts; or if it should appear that the naib was not in fault then she has a cause of action against the other defendants in the suit; that the Judge should, therefore, have enquired whether the alleged hoondee was, as the first Court has held, a forgery or whether it was genuine, and according to his finding, decreed the claim against the parties liable.

We are of opinion that the plaintiff has a cause of action; that she has, if she can prove her case, suffered a direct injury to the extent she alleges; and that she is entitled to redress. It is a question how far the rule of English Law, which suspends the Civil remedy where the act done is felonious, is applicable to this country? The rule, however, is certainly not applicable to this suit. It might have been applicable had the plaintiff's naib been still alive; but as he is dead, the plaintiff is no longer bound to suspend her action for a Civil remedy, until she has brought a complaint against him on the Criminal charge. It is not shewn that the plaintiff has in any way attempted to shield the act of her naib if criminal. It is quite possible that she may have been, as she alleges in her plaint, in doubt as to who was the offending party, the naib or the parties who negotiated and afterwards dishonoured the hoondee.

The Judge's decision must be set aside, and the case remanded for trial on the merits.

The 15th February 1865.

Present:

The Hon'ble C. Steer and E. Jackson, *Judges.*

Small Cause Courts (Jurisdiction of)—Incidental question of title—No special appeal.

Case No. 3148 of 1864.

Special Appeal from a decision passed by Mr. F. Tucker, Judge of Shahabad, dated the 11th August 1864, reversing a decision passed by Baboo Burmha Dutt Moonsiff of that District, dated the 28th April 1863.

Shumbhoo Chowdhry (Plaintiff), *Appellant,*

versus

Mr. R. Combs (Defendant), *Respondent.*

Baboo Kalee Mohun Doss and *Moulvie Aftabooddeen Mahomed* for Appellant.

Baboo Mohinee Mohun Roy for Respondent.

No special appeal lies in a suit cognizable by a Small Cause Court.

The jurisdiction of the Small Cause Court is not barred because it has to enquire into a question of title to land as incident to the question of the value of trees taken off the land.

THIS is a suit for price of trees.

The Lower Appellate Court has held that the plaintiff is not entitled to claim the price of the trees, and dismissed the suit.

The plaintiff files a special appeal against this decision. But as the suit was one in its nature cognizable by the Small Cause Court, no special appeal will lie. It is said that the suit was not one in its nature made cognizable by the Small Cause Court, inasmuch as the title to the land was in dispute; but it does not bar the jurisdiction of the Small Cause Court that it has to enquire into a question of title to land as incident to the question of the value of trees taken off the land. We dismiss the special appeal with costs.

The 15th February 1865.

Present:

The Hon'ble C. Steer and E. Jackson, *Judges.*

Suit by widow for her husband's share of joint property.

Case No. 2573 of 1864.

Special Appeal from a decision passed by Mr. A. Pigou, Judge of Hooghly, dated the 22nd June 1864, reversing a decision passed by the Additional Sudder Ameen of that District, dated the 9th January 1864.

Bindoo Bashinee Dassee (Plaintiff), *Appellant,*

versus

Anund Chunder Paul (Defendant), *Respondent.*

Baboo Otool Chunder Mookerjee for Appellant.

Baboo Gopal Lall Mitter for Respondent.

Suit by a widow for possession of her husband's share of joint property inherited from his grandfather. HELD that, if the plaintiff's husband died before his grandfather, she had no title: but that, if he had outlived his grandfather, his widow would be entitled to his share on proof of her having lived in commensality with the defendant within 12 years from the date of her dispossession.

THIS is a suit by the widow of one Eshan for possession of her husband's share of the joint property.

The first Court gave the plaintiff a decree, holding that she had established that she was in joint possession with the defendant.

The Judge, without disputing the facts found by the first Court, *viz.*, that plaintiff was living with the defendant in his very house, and messing with him, considered that these facts were not sufficient to prove a joint possession of the property on the plaintiff's part, and held her suit barred by want of proof of possession.

We think this judgment cannot stand. If the plaintiff's husband Eshan had acquired any right in the property of his grandfather Ram Joy, then, no doubt, as the descendants of Ram Joy were a joint family, the plaintiff, as wife of one of the descendants, would be entitled to succeed to her husband's share, and the proof which she has given of her *status* in the defendant's household would be sufficient to prove her joint possession. But the answer of the defendant raised an issue which disputed the right of the plaintiff's husband Eshan to any share in his grandfather's property, inasmuch as he died in the life-time of his grandfather. If this is the fact, then the plaintiff has no title; but if it is found that Eshan out-lived his grandfather Ram Joy, then we think that the plaintiff, his widow, has sufficiently established her right to his share, by showing that she lived in commensality with the defendant within 12 years from the date of her dispossession. we remand the case for trial with reference to these directions.

The 15th February 1865.

Present:

The Hon'ble C. Steer and E. Jackson, *Judges.*

Hindoo Law—Inheritance—Sister and Sister's Daughter.

Case No. 3109 of 1864.

Special Appeal from a decision passed by Captain T. Lamb, Deputy Commissioner of Kamroop, dated the 28th July 1864, *affirming a decision of Monshee Aradhun Dutt, Sudder Ameen of that District, dated the 11th July* 1864.

Kalee Pershad Surma (Plaintiff), *Appellant,*

versus

Bhoirabee Dabee and others (Defendants), *Respondents.*

Baboo Aushootosh Dhur and *Issur Chunder Chuckerbutty* for Appellant.

Baboos Juggadanund Mookerjee and *Dwarkanauth Sein* for Respondents.

According to Hindoo law, neither a sister nor a sister's daughter can inherit.

THE Plaintiff sues as a kinsman and nearest heir of Kalee Kinkur Surma for possession of the property in suit, and to oust the defendants who are sisters of the said Kalee Kinkur Surma.

The Court below seems to have regarded the property in suit as of Dabee Pershad the father of Kalee Kinkur, and looking for his heirs pronounces that the defendants, who are daughters, have a superior right of inheritance to the plaintiff who is a kinsman in the fourth degree in descent to the said Dabee Pershad. This would, no doubt, be a good ground for deciding in favor of the defendants if the estate was the estate of Dabee Pershad. But it does not seem to be disputed that the estate of Dabee Pershad came to his son Kalee Kinkur; and the right then of the defendants depends on the question whether, under the Hindoo Law or the custom of the country, sisters succeed. This has not been decided; and we think there can be on doubt that, as sisters, the defendants cannot, under the Hindoo Law, succeed their brother Kalee Kinkur, nor can a sister's daughter. It is said that of the three sisters one is a widow, another is unmarried and a third has a daughter and may have a son who would be heir, but no son has been born yet, and the inheritance cannot remain in abeyance. We must hold then that the defendants, as sisters of Kalee Kinkur, have no right of inheritance to him, and that the plaintiff whose lineage is not disputed is capable, in absence of other nearer heirs, of succeeding to him. The decision of the Lower Court must, therefore, be reversed, and the suit remanded in order that the other issues raised in the defence may be tried.

The 15th February 1865.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Mahomedan law—Devise to Daughter—Estoppel—Possession of manager not adverse.

Case No. 3245 of 1864.

Special Appeal from a decision passed by Mr. F. L. Beaufort, Judge of the 24-Pergunnahs, dated the 13th September 1864, reversing a decision passed by Baboo Koylash Chunder Deb, Second Principal Sudder Ameen of that District, dated the 30th April 1864.

Mahomed Mudun and others (Plaintiffs), *Appellants,*

versus

Khodezunnissa *alias* Khookee Beebee (Defendant), *Respondent.*

Mr. R. E. Twidale and *Khettur Mohun Mookerjee* for appellants.

Baboos Debendro Narain Bose and *Anund Gopal Paleet* for Respondent.

Under the Mahomedan Law a person cannot devise more than moiety of his estate to his daughter.

If a man takes out probate of a will, his heirs are not estopped from disputing the will.

The possession of a manager for the rest of the family is not adverse.

THIS was a suit based on a right of inheritance under the Mahomedan Law.

Gol Mahomed had four sons :—Mudun, Sadun, Boduruddi, and Khyroolla, and one daughter Basan.

The plaintiffs in this suit are Mudun and the three widows of Sadun, who have purchased the share of the daughter Basan. The estate claimed is that of Khyroolla, the fourth son of Gol Mahomed, who left a daughter, Khookee.

The plaintiff's case is this, that Khyroolla's will bequeathing his whole estate to Khookee is invalid under the Mahomedan Law, and that she could not inherit more than a moiety of the estate; that the remaining moiety, or 30 sehams, must be divided thus: 12 sehams to Mudum and 12 sehams to the heirs of Sadun, the uterine brothers of Khyroolla, and 6 sehams to Basan, the sister of Khyroolla.

The judge found that the will was genuine and valid, and the hibbanamah and ekrarnamah fraudulent; that under the will the defendant Khookee was entitled to the whole estate.

There can be no question that the Judge is wrong in holding that the will was valid. Under the Mahomedan Law, Khyroolla could not devise to his daughter Khookee more than her legal share in the estate, *i. e.*, a moiety. *See* Hedaya, Volume IV, pages 470 and 472; Select Reports, Volume V, page 287; Volume VI, page 159.

The pleader for the special respondent is constrained to admit that the Judge is wrong in law. But he contends that, as Sadun took out probate of the will of Khyroolla, his widows, the plaintiffs, are estopped from disputing this will; that inasmuch as, after the death of Sadun, Mudun, another plaintiff, acted as manager for Khookee the defendant, the plaintiffs are barred by the Statute of Limitations; and lastly, with reference to the share of Basan, that the plaintiffs have not proved their purchase from her, and that, until they do so, they cannot ask to be put in possession of her share in right of purchase.

We think that, as the will is clearly invalid under the Mahomedan Law, the act of Sadun is not binding upon his heirs. Mudun acted as a manager for the rest of the family, and his possession is not adverse.

With reference to the share of Basan, it was not contended below by the special respondents, that the plaintiffs had not purchased her share. They stood on the will as both genuine and valid. As the will is invalid, the plaintiffs are entitled to a decree for a moiety of the estate of Khyroolla in reversal of the decision of the Judge, with costs of all the Courts.

The 15th February 1865.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Special Appeal—Remand under Section 351 Act VIII of 1859—Calling for additional evidence under Section 355.

Case No. 3248 of 1864.

Special Appeal from a decision passed by Mr. F. L. Beaufort, Judge of the 24-Pergunnahs, dated the 29th July 1864, affirming a decision passed by Baboo Koylash Chunder Deb, Principal Sudder Ameen of that District, dated the 26th February 1864.

Nowcowree Mundul (Defendant), *Appellant,*

versus

Mookta Bibee (Plaintiff), *Respondent.*

Baboos Kalee Prosunno Dutt and *Gopaul Lall Mitter* for Appellant.

Baboo Banee Madhub Banerjee for Respondent.

A special appeal does not lie merely because the Lower Appellate Court remanded a case under Section 351 of Act VIII of 1859, instead of calling for additional evidence under Section 355, without proof that the special appellant has been prejudiced.

THIS was a suit to recover possession of 19 beeghahs 7 cottahs of land, of which special respondent (plaintiff in the Court below) alleged herself to have been dispossessed.

The defence was purchase from the special respondent's husband of 4 beegahs 10 cottahs of the land in question, and denial of the plaint regarding the remainder. Special appellant asserted that, not only had he not dispossessed the plaintiff of that land, but that she was at the time of suit herself in quiet possession.

The Court of first instance dismissed the suit; but the Judge, on appeal, remanded it with directions to take further evidence. This was done, and the Principal Sudder Ameen altered his first judgment, decreeing the suit in plaintiff's favour, in which he was supported by the Judge on appeal.

It is urged specially before us, that the order of the Judge remanding the case was under the circumstances illegal; and that, as only 4 beegahs 10 cottahs were in issue, the Judge ought not to have decreed mesne profits and costs on the whole.

On the first point, we observe that, under Section 351 of the Civil Procedure Code, the Judge was, no doubt, wrong in remanding the case, as the judgment of the first Court was not on a preliminary point which excluded any necessary evidence of fact. He should have proceeded under Section 355, and have directed the Principal Sudder Ameen to record the further evidence considered necessary, retaining the case on his own file. But this is after all only a technical objection, and the special appellant has been in no way prejudiced.

For the rest, we find that the Judge has found as a fact, that the kubalah field by the special appellant is false, and that he has dispossessed the special respondent of all the land in suit. This is a finding with which we cannot interfere in special appeal.

With regard to the mesne profits, the Judge has allowed them from the date of the plaint only, considering that the actual time of the special respondent's dispossession was not clearly made out; and as he decreed the whole amount of land claimed he could not reasonably have done less than award full costs.

We see no reason, therefore, to interfere, and dismiss the special appeal with costs.

The 16th February 1865.

Present:

The Hon'ble C. Steer and E. Jackson, *Judges.*

Limitation—Ignoring of an Act IV award.

Case No. 3241 of 1864.

Special Appeal from a decision passed by Mr. J. R Muspratt, Judge of Purneah, dated the 12th July 1864, *reversing a decision passed by Moulvie Anwur Ali, Principal Sudder Ameen of that District, dated the 22nd December* 1863.

Sheikh Jainooddeen Ahmed (one of the Defendants), *Appellant,*

versus

Ameeroonissa (Plaintiff), and the Government (Defendant), *Respondents.*

Mr. G. Gregory for Appellant.

Baboos Kishen Kishore Ghose and *Taruck-nath Sein* for Respondents.

A party cannot ignore an Act IV award passed against himself and sue to establish his right to the property involved in the Act IV case after the lapse of 3 years, as if the Act IV award was no bar to his recovery.

THE plaintiff sues to set aside an order of the Civil Court, rejecting her claim to the land in suit, which was attached in execution of a decree against Kiam Rajah, and to establish her right and title to the same.

The first Court found that the plaintiff was put out of possession under an award of the Magistrate under Act IV of 1840; and inasmuch as the plaintiff did not bring her suit within 3 years to set aside that award, the suit was barred.

The Judge, holding that the claim, as laid, had nothing to do with the Magistrate's order, thought the plaintiff's suit was not barred, and remanded the case.

The Judge, therefore, thinks that a party may ignore an Act IV award passed against himself, and may sue to establish his right to the land involved in the Act IV case after 3 years, though, if he had sued to establish his right by reversal of the Act IV award, he would, no doubt, be bound to bring his suit within three years.

We think this view of the Judge altogether incorrect. The Act IV award is a

bar to the recovery of this property; and the law requires that a party to the award shall bring his suit to set aside the bar within three years. It will not do for a party bound by the order under Act IV to say nothing of the Act IV award, and to sue as if there was no bar to his recovery. We think the plaintiff was clearly bound by the Act IV award, and was clearly bound to bring his suit to set aside the effect of that award within 3 years from the date of the award.

The judgment of the first Court being right, we affirm that, and set aside the order of the Judge which remanded the suit. The plaintiff will pay all the costs of suit.

The 16th February 1865.

Present:

The Hon'ble J. P. Norman and Shumboonauth Pundit, *Judge.*

Limitation—Right of exclusive use of temple built on joint property.

Case No. 2823 of 1864.

Special Appeal from a decision passed by Baboo Anund Chunder Banerjee, Principal Suddder Ameen of Rajshahye, dated the 23rd June 1864, *modifying a decision passed by the Moonsiff of that District, dated the 11th September* 1863.

Kissorynath Chowdhry (Plaintiff), *Appellant,*

versus

Hurro Kant Chowdhry and another (Defendants), *Respondents.*

Baboo Bama Churn Banerjee for Appellant.

Baboos Onoocool Chunder Mookerjee and *Mohinee Mohun Roy* for Respondents.

The plea of limitation is not applicable to a suit for declaration of title regarding ijmalee lands upon which temples have been built and idols established by another co-sharer. If that share-holder claim exclusive use of the temples, he must prove a possession and enjoyment different from those of a Hindoo co-sharer of joint property, particularly with regard to a temple added by him to an ancestral *poojah-baree.*

THE special appellant, within 3 years of his attaining majority, brought this action for a declaration of his title to hold one-fifth of certain lands and buildings, temples, &c., containing certain idols, all which he asserted formed the joint ancestral *poojah-baree,* and from which he said he had been dispossessed during his minority. The defendant stated in answer that all the lands in dispute formed a portion of the lands allowed to him as his residence; that the temples, &c., were built and the idols established by his father and himself; and asserting that the plaintiff's father had never enjoyed any kind of possession, pleaded limitation.

The Court of first instance considering the plaintiff to have proved his case gave him a decree for his share in the whole property; but the Lower Appellate Court, on the appeal of the defendant, amended this decree to the extent that it considered the claim of the plaintiff to certain of the temples was barred.

The special appellant complains that the property which has thus been excluded from the decree are temples found by the Lower Appellate Court to have been built by the father of the defendant, and the defendant, during the life-time of the father of the plaintiff, without any opposition, not from any joint funds, and on which the defendant's father and the defendant have established idols of their own, and have been worshipping them from a long time exclusively; that the finding is not sufficient to justify the dismissal of the claim of the plaintiff on the plea of limitation which cannot arise in any case of ijmalee lands. The respondent objects that the Lower Appellate Court has merely assumed, but has not found it as a fact, that these excluded properties stand upon ijmalee land.

In a case like this, for declaration of title to ijmalee lands upon which any shareholder may have built separate temples, the plea of limitation is not applicable; and we do not understand upon what principle the Lower Appellate Court dismissed the claim of the plaintiff, though it may have been satisfied that the temples, &c., excluded by it, were in the possession of the defendant. We do not further understand the nature of the exclusive use which, the Court below considers, was proved by the defendant. The possession and enjoyment must be of a nature not consistent with the enjoyment of a Hindoo co-shaaer of a joint property, particularly with regard to a temple added to an ancestral *poojah-baree,* before a decree for a joint possession is to be refused to the other co-sharers. Even if such an exclusive possession be established, the plaintiff would still be entitled to a declaration of his joint rights over the joint lands, though the Court may consider it fit to make proper provision for fixing the manner of the plaintiff's future enjoyment of these rights over the joint lands so that they may not encroach upon the just

rights of the other co-sharer who may have been without opposition allowed to build the temples, and to establish his own idols, for his own exclusive use. The Principal Sudder Ameen who treats the plea of limitation as applicable to the case of a shareholder occupying for his own purposes a portion of ijmalee lands, has perhaps assumed without trial with regard to the temples, &c., excluded, particularly the temples mentioned in the trial of the issue No. 2, that the lands upon which they are built are joint lands. If so, the defendant is entitled in his appeal before the Lower Appellate Court to see his objections on that head properly tried. We accordingly uphold the order of the Lower Appellate Court to the extent of the decree given to the plaintiff, and remand the case to the said Court with reference to the properties excluded from his decree, in order to try the objection of the defendant regarding the lands, and if it find them to be ijmalee lands, to give the plaintiff a declaration with regard to them with such limitations and restrictions as the equity of the case may require.

The Weekly Reporter,

APPELLATE HIGH COURT.

No. 10.] APRIL, 1865. [Vol. II.

The 18th February 1865.

Present:

The Hon'ble C. Steer, G. Campbell, and E. Jackson, *Judges.*

Suit for mesne profits (against a stranger for wrongful possession)—Title.

Case No. 1474 of 1864.

Special Appeal from a decision passed by Mr. F. J. Cockburn, Judge of Backergunge, dated the 16th March 1864, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 31st December 1862.

Mahomed Kadur and another (Defendants), *Appellants,*

versus

Puddomala and others (Plaintiffs), *Respondents.*

Baboos Romesh Chunder Mitter and *Kalee Mohun Dass* for Appellants.

Baboos Unnoda Pershad Banerjee and *Hem Chunder Banerjee* for Respondents.

Before A can succeed in a suit for mesne profits against B on the ground of B's wrongful appropriation of the profits of howalas and neem howalas, it must either be admitted or proved that A holds them. If he holds them as subordinate tenures in C's ousut talook, C should be made a party, and A's claim to the mesne profits decided in the presence of C, whether C denies or admits the existence within his ousut talook of A's alleged howalas and neem howalas. (*Dissentiente* Steer J. who held that C denied the existence as above, A's suit should be dismissed at once, for in a suit simply for mesne profits against a stranger for wrongful possession, the title of plaintiff and of C cannot be tried.)

Mr. Justice Steer.—THE plaintiff alleges that he holds 18 howalas and neem howalas in an ousut talook belonging to Gooroo Pershad Doss and others; that the defendant, dispossessing Gooroo Pershad Doss, collected the rents of plaintiff's 18 howalas and neem howalas from the tenantry; that Gooroo Pershad Doss sued the defendant for possession and succeeded; and that, having got possession himself, the plaintiff has been reinstated in his howalas. He brings this suit against the defendant to recover from him the rents of the howalas realized by him while he was in possession of the ousut talook and its subordinate howalas.

The defendant pleaded that the plaintiff held but 3 howalas within the ousut talook of Gooroo Pershad, and he denied having dispossessed the plaintiff.

The first Court found upon the evidence that the plaintiff whose right to 3 howalas was not disputed, and who had proved dispossession therefrom, was entitled to demand from the defendant the rents which he had realized upon these tenures. In respect to the other 15 howalas and neem howalas, the first Court thought that, as the plaintiff's title was disputed, he could not sue for the rents of those tenures which had been realized by the defendant, unless he first established his right and title to them. In this view, the Court dismissed the claim in regard to these howalas, and gave a decree only for the rents recovered by the defendants from the other three holdings.

The Judge held that a suit for mesne profits would lie, though the right to the howalas was disputed; but that the plaintiff would have to prove, in order to entitle himself to the wasilat, that the land was his. He considered that the plaintiff had given adequate proof that the whole of the 18

howalas belonged to him; and he accordingly decreed to the plaintiff the rents which the defendant had realized, according to the principle of calculation adopted by the Principal Sudder Ameen in respect to the 3 howalas to the rents of which he had declared the plaintiff entitled.

It is urged in special appeal that there is no privity between the plaintiff and the defendant such as to entitle him to sue the defendant for the recovery of the rents; and that before the plaintiff can bring a suit for mesne profits, he must first prove his right to the land. It is also objected that, though the defendant denied dispossessing the plaintiff from any of the howalas, the judge has not given any opinion as to whether the dispossession by him is proved or not.

We think that, before the plaintiff can succeed in this suit for mesne profits against the defendant, on the ground of the defendant's wrongful appropriation of the profits of howalas and neem howalas, it must either be admitted that he holds these tenures, or it must be proved that he holds them. The Judge says that the plaintiff has proved that he holds the howalas; but he holds them under Gooroo Pershad, and Gooroo Pershad has not been made a party to this suit. Therefore, it cannot be said in the absence of Gooroo Pershad, that the plaintiff's possession of the 15 howalas and neem howalas as subordinate tenures under Gooroo Pershad has been proved. Gooroo Pershad may deny the plaintiff's right, andmay sue the defendant for the mesne profits upon the very same land for which the Court is now asked to award the plaintiff the mesne profits.

It does not seem to have been pressed upon the attention of either of the Courts below that Gooroo Pershad was a material party in respect to the issue whether there existed within his ousut talook the howalas and the neem howalas pleaded by the plaintiff and denied by the defendant. But still the Court should have seen how impossible it was to arrive at any adjudication upon the point in the absence of Gooroo Pershad; and as it had the power to make him a defendant, it ought to have done so. It being then the error of the Court itself that its judgment has miscarried, we consider it right that the case should be remanded in order that Gooroo Pershad may be made a defendant. If he admits the disputed 15 howalas and neem howalas, all question as to the plaintiff's right to them will be set at rest, and there will be no bar to his recovery of the mesne profits from such of the howalas and neem howalas as Gooroo Pershad admits. If Gooroo Pershad denies the existence within his ousut talook of the plaintiff's alleged howalas and neem howalas, or denies any of them, then we think the plaintiff's suit for the mesne profits of these against the defendant must be at once dismissed, for, in a suit simply for mesne profits against a stranger for wrongful possession, the title of the plaintiff and the title of Gooroo Pershad cannot be tried. Gooroo Pershad may admit the plaintiff's title, and, if so, there will be no title to try; but if he does dispute the plaintiff's title, his title and the title of the plaintiff cannot be tried in a suit for mesne profits against a stranger, and this view is fully supported by the decision of this Court of the 31st December 1862, published in page 480 of Hay's Decisions for that month.

Mr. Justice Jackson.—I agree with my colleague that this case should be remanded in order that the plaintiffs right to mesne profits may be determined in the presence of Gooroo Pershad Doss; but I think that the Court having made Gooroo Pershad a party, should go on to decide, as between the plaintiff and Gooroo Pershad, whether plaintiff is entitled to the mesne profits he claims, and whether Gooroo Pershad denies his claim or admits it?

Mr. Justice Campbell.—This case has been referred to me. But both parties now declare their readiness to accept an order of remand in the terms of Mr. Justice Jackson's judgment. I also concur in that judgment, and the case is remanded accordingly.

The 18th February 1865.

Present:

The Hon'ble J. P. Norman and Shumboonath Pundit, *Judges.*

Frauds by Agent or by Member of a Firm—Liability of Principal or innocent partners.

Case No. 79 of 1864.

Regular Appeal from a decision passed by Baboo Madhub Chunder Chowdhry, Additional Principal Sudder Ameen of Dacca, dated the 30th December 1863.

Luckhee Kant Bonik and others (Defendants), *Appellants,*

versus

Ram Chunder Bysack and others (Plaintiffs), *Respondents.*

Baboos Sreenauth Doss and *Shib Chunder Mojoomdar* for Appellants.

Baboos Onoocool Chunder Mookerjee and *Dwarkanath Mitter* for Respondents.

Suit laid at Rupees 11, 380-14-8.

An ordinary mercantile firm is responsible for frauds committed by one of its members, or by a gomashtah or other similar agent, while acting for and in the business of the firm; and innocent partners cannot divest themselves of responsibility on the ground that they never authorized the commission of the fraud. When such a person, acting within the scope of his authority as evidenced by the business of the firm, obtains money and misapplies it, the firm will be responsible.

THIS is a suit by the plaintiffs who allege that the defendants, Luckhee Kant Bonik and Gunga Kant Bonik, carried on business in Calcutta as bunneas; that, for the purposes of their trade, they were in the habit of remitting hoondees to their gomashtah, Gopee Churn Bonik; that Gopee Churn in case of any delay in receiving the amount covered by the hoondees, used to deposit the hoondees with money-changers, taking from them the amount less discount; that accordingly he deposited six hoondees with the plaintiffs receiving from them 12,000 rupees after deducting discount; that he repaid 1,000 rupees, but the hoondees not being paid, the plaintiffs sue for the balance with interest, after allowing 625 rupees realized from the defendants.

The first defendants pleaded that the hoondees were false, that they did not receive any money upon them through their gomashtah, and that Gopee Churn was not their gomashtah and had no authority to bind them.

It appears from the plaintiffs' books produced and proved by their gomashtah, that on the 10th of Bhadro 1267 (Mohajuni) the plaintiffs' advanced to Luckhee Kant and Gunga Kant Bonik through Goopee Churn Bonik 4,500 rupees, on the 16th of the same month a further sum of 2,500 rupees, and on the 19th of the same month 5,000 rupees, on the deposit of six hoondees, for a total amount of 15,000 rupees. In the year 1265, Gopee Churn had obtained from the plaintiffs, in the names of Luckhee Kant and Gunga Kant, advances in a similar manner to the extent of 2,002 rupees. In 1266, the business thus done amounted to 96,536 rupees, and in the year 1267 to 1,28,914 rupees. The Lower Court finds that it is proved, by a decree of the Principal Sudder Ameen of Dacca and by the depositions of several respectable witnesses, that Gopee Churn was the gomashtah of the defendants' Calcutta Guddee. It was proved that Gopee Churn, failing to pay the money when due, fled to Chandernagore. The Principal Sudder Ameen, in a very careful and sensible decision, comes to a conclusion to the effect that the plaintiffs, according to the usual course of business between the parties, as shewn by the prior transactions, lent this money to the defendants, and that the defendants are responsible for it.

The defendants appealed. Their vakeel, Baboo Sreenauth Doss, attempted to show that Gopee Churn was not the plaintiffs' gomashtah. There is, however, conclusive evidence that, professing to be their gomashtah, and to manage their Calcutta trade, he carried on a large business in their names for two or three years.

The defendants at one time say that he was not their gomashtah, at others that he was not their gomashtah except for the occasional purpose of buying groceries and sending them to Naraingunge where they themselves reside; but they do not produce the books of the business at Calcutta or at Naraingunge. The plaintiffs' witness, Ram Comul Mojoomdar, who is their mohurrir at Dacca, having received a telegram from Calcutta informing him that the acceptors of the hoondees could not be found, and that he must, therefore, demand the money from the defendants, went to the defendants' golah and told them what had happened. They said they knew nothing about it, and that they could not give any answer till they heard from their Calcutta gomashtah, Gopee Churn. It is possible that the description of Gopee Churn as the Calcutta gomashtah, may be an addition of the witness. But it is clear that, at this time, the defendants had not thought of disavowing Gopee Churn altogether as a person whose acts could not affect them. On a second interview, Luckhee Kant said that he had received a letter from Gopee Churn, and that Gopee Churn had also written to Rughoonauth. He added that, until he received letters and accounts from Gopee Churn, he could not make a settlement, especially as he was not in funds to pay such a sum. A letter of Gopee Churn to the address of Kalee Churn, his brother, was subsequently produced, in which he said that, with part of the 12,000 rupees borrowed, he had paid debts of the firm, and had fled with the balance to Chandernagore. Rughoonauth Bonik, who appears to have acted the part of a mutual friend of the parties, endeavoured to settle the matter, and, in fact, succeeded in doing so, the defendants

agreeing to pay 5,000 Rupees in satisfaction of certain instalments. But the defendants, after having paid 625 Rupees under this arrangement, refused to abide by it. Rughoonauth's evidence shows that the defendants did not at that time deny that Gopee Churn was his gomashtah.

Under these circumstances, we think it is clear that there was ample evidence to justify the Principal Sudder Ameen in coming to the conclusion that the the borrowing of money by Gopee Churn was within the ordinary scope of his authority as the gomashtah and general agent of the defendants' firm, and that the Principal Sudder Ameen was quite correct in stating, as he does, that if the hoondees were forgeries, it was no more an answer than it would have been to a suit to recover money, but to show that the borrower pledged brass vessels alleging them to be gold. The defendants not having chosen to produce their books, we are by no means certain that they have not had the full benefit of the monies borrowed by Gopee Churn. But, even if this is not so, the case will fall within the principle that an ordinary mercantile firm is responsible for frauds committed by one of its members, or by a gomashtah or other similar agent, while acting for and in the business of the firm; and innocent partners cannot divest themselves of responsibility, on the ground that they never authorized the commission of the fraud. When such a person, acting within the scope of his authority as evidenced by the business of the firm, obtains money and misapplies it, the firm will be responsible. *See* Lindley on Partnership 242—244.

We dismiss the appeal with costs and interest.

The 18th February 1865.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Service of notice of sale of Putnee Talook—Meaning of the word "substantial" in Clause 2 Section 8 Regulation VIII 1819.

Case No. 230 of 1864*

Special Appeal from a decision passed by Mr. F. L. Beaufort, Judge of the 24-*Pergunnahs, dated the* 18*th November* 1863, *affirming a decision passed by Baboo Grish Chunder Ghose, Principal Sudder Ameen of that District, dated the* 18*th May* 1863.

Gopal Kishore Shoor and others (Plaintiffs), *Appellants,*

versus

Mudun Mohun Holdar and others (Defendants), *Respondents.*

Mr. G. C. Paul for Appellants.

Mr. R. V. Doyne and *Baboo Sreenath Doss* for Respondents.

With reference to the provision in Clause 2 Section 8 Regulation VIII of 1819, that the service of notice of sale of a Putnee Talook shall be attested by three *substantial* persons,—Held that the word "substantial" must be understood in its ordinary sense, and not be taken to mean simply men who can readily be found.

THIS was a suit for the reversal of the sale of a putnee-talook, on the ground that the notice required by clause 2 Section 8 Regulation VIII of 1819, had not been duly served.

The Court of first instance and the Judge held that the sale was good, and the service of the notice, proved and sufficient. This Court in special appeal, was of opinion that as there were three attesting witnesses, of comparative respectability to the service of the notice, the requirements of the law had been fulfilled, the appeal was dismissed and the sale confirmed.

An application for review was made, and notice issued on the opposite party.

It is contended by Mr. Paul, the learned Council for the applicant for review, that the law requires that the attesting witnesses must be "substantial," that is to say, respectable moderately wealthy men, against whom, in case of false attestation, the party injured may have his remedy in a suit for damages. Mr. Doyne, the learned Counsel for the opposite party, urges that all that the law requires is, that the attesting witnesses should be persons who may be readily found in case the serving peon should depose falsely to the service of the notice.

On turning to the preamble of Regulation VIII of 1819, we find that the Legislature deemed it indispensable to fix the process by which putnee-talooks were to be periodically brought to sale, and the zemindar was held to be exclusively answerable for the due performance of the forms prescribed. Clause 2 Section 8 Regulation VIII of 1819 enacts that the notice of sale shall be served by a single peon who shall bring back the receipt of the defaulters, or of his

* Review No. 691 of 1864

manager for the same, or in the event of inability to procure this, the signatures of three substantial persons residing in the neighbourhood.

Now, in this case, the attesting parties are sufficient in number, and they reside in the neighbourhood, but with the exception of the Mundul, the rest are not what can be called substantial persons. One is the chowkeedar of the village, and the other a ticca tailor. The Legislature invested the zemindar with the power of bringing subordinate putnees to sale, and made him exclusively answerable for the due observance of the prescribed processes under which such tenures could be brought to sale. To protect the putneedar from fraud, it was enacted that the notice of sale must be attested by three substantial persons. Now, it is clear that, unless the attesting parties answer to the common meaning to be put upon the word "substantial," the putneedar would be wholly without remedy in case of false attestation. If, as contended by Mr. Doyne, the word "substantial" means simply men who could be found, it would have been sufficient to have enacted that the notice was to be attested by three persons "residing in the neighbourhood;" the word "substantial" was wholly superfluous. Holding, therefore, that the notice in this case has not been served as required by law, we reverse the sale, and decree this appeal with costs and interest.

The 18th February 1865.

Present:

The Hon'ble G. Loch and J. P. Norman *Judges.*

Endowed property—Leases by Khadims.

Case No. 2688 of 1864.

Special Appeal from a decision passed by the Judge of Rajshahye, dated the 22nd June 1864, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 21st May 1862.

Sujawut Ali *alias* Peer Ali (Defendant), *Appellant,*

versus

Bushearooddeen and others (Plaintiffs), *Respondents.*

Baboos Mohindro Lall Shome and *Mohinee Mohun Roy* and *Moulvie Murhumut Hossein* for Appellant.

Baboos Debendro Narain Bose and *Grish Chunder Ghose* for Respondents.

Unless endowed property descends to the heirs of a deceased khadim, they can have no right to manage or interfere with the property. If a khadim has only a life interest, any lease given by him will be in force only during his life-time, and cannot continue without the consent of the succeeding khadim, or perhaps of the Mootawallee if he has any special right to confirm leases.

THE lands in dispute form part of certain wukf property, comprising altogether 250 beegahs, which were released by the Special Commissioner on 15th April 1841 from the claim of Government to resume them. The lands in that suit were released to the mootawallee and khadims—the mootawallee being the defendant in this case, who calls himself by that title; and the khadims being some of the representatives of the lessors of the plaintiff. It is evident, therefore, that, in 1841, the khadims, now represented by plaintiff's lessors, joined with Sujuawt Ali in an appeal to set aside the claim of Government, and in that case not only made no objection to his assuming the title of mootawallee, but described themselves as khadims and set up the title of Sujawut Ali as mootawallee, and, upon that allegation, obtained the release of the property, as wukf; and, therefore, it does not now lie in their mouth to say that there is no difference between them, that all are khadims. They have recognized Sujawut Ali as mootawalee. The Special Commissioner has recognized him as such; and though no question was then raised as to Sujawut Ali being mootawallee, we think that had he not been so, he would neither have assumed the title, nor would the khadims have allowed him to do so without raising some objection.

But the real question which has to be disposed of is, what is the position of the khadims, and what are their rights? Plaintiff derives his title from the widows of certain khadims. From the record before us, it appears that each khadim received so much land of his wukf property for his support, and as remuneration for his service connected with the *durga*. Had the khadim more than a life-interest in such land, and did it descend to his heirs male and female; or was his only a life-interest, and, on his death, did the newly appointed khadim obtain possession of the lands? It is pointed out to us that the papers show that there were females holding the office of khadims. This should be enquired into, and if such be proved to have been the case, whether plaintiff's lessors

were in that position, and entitled to give leases for the lands held by them? It is evident that unless the wukf porperty descended to the heirs of a deceased khadim, they could have no right to manage or interfere with the property; and that if the khadim had only a life-interest, any lease that he might give, would be in force only so long as he lived, and could not continue without the consent of the succeeding khadim, or perhaps of the mootawallee. It may be that the mootawallee had some special rights to confirm leases. All these points should be enquired into.

The Judge is wrong in supposing that the defendants derived their rights from the Special Commissioner's decision. That merely recognizes a state of things then and previously existing. We think that the question of the plaintiff's lessors' title has not been so fully investigated as it should have been, and we remand the case for re-trial with reference to the above remarks.

The 20th February 1865.

Present:

The Honble C. Steer and E. Jackson, *Judges.*

Purchase (by Agent)—Evidence.

Case No. 291 of 1864.

Regular Appeal from a decision passed by Baboo Greesh Chunder Ghose, Principal Sudder Ameen of the 24-Pergunnahs, dated the 29th April 1864.

Goreeboollah Sircar (Plaintiff) *Appellant,*

versus

Mr. G. D. Boyd and others (Defendants), *Respondents.*

Mr. J. Baptist, and *Moonshee Ameer Ali Khan Bahadoor,* and *Baboo Debendro Narain Bose* for Appellant.

Baboo Kheitur Mohun Mookerjee for Respondents.

Suit laid at Rupees 7,615-8 as.

If A admits that he made a purchase as agent for B, this admission is evidence against A's heirs and against C who claims through them, to show that the purchase was made by A as agent and not on his own account.

THE facts of this case, as they appear to be admitted or established, are these:—

Mr. Boyd was the tenant of another tenant of the Government Khas Mehal Debee Punchanogram. Boyd's rent was not paid, and his superior tenant got the Collector to sell his land on which Mr. Boyd had built a pucca house. At the sale, Abdool Sircar bought it. Unable to get possession from Boyd, Abdool Sircar brought a regular suit for possession against him, and Boyd brought another regular suit against Abdool and others to set aside the sale. While these suits were pending, a petition was put in purporting to have come from Abdool Sircar, in which he avowed that he made the purchase as a trustee for the plaintiffs, the sons of one Haro Sircar, and desired that the plaintiffs might be substituted in his place in the pending suits. This was accordingly done; and six weeks after that, Abdool Sircar died. Boyd then arranged with the heirs of Abdool Sircar to sell to him their rights and interests in the property; and when this was completed, he withdrew his suit for the reversal of the auction-sale. The suit, which Abdool Sircar had instituted, and in which the plaintiffs had been substituted in his place, was, for reasons which it is not necessary to detail, non-suited. Boyd remaining in possession, the present suit is instituted by the plaintiffs to establish their right as representatives of Haro Sircar, the party for whose benefit the purchase was made, to oust Mr. Boyd and obtain from him mesne profits from the date of the auction-purchase.

The chief question to be decided was whether Abdool Sircar made the purchase for himself or as agent of Haro Sircar.

It is undisputed that a petition was put in as from Abdool Sircar, in which he avowed that he made the purchase as agent for Haro Sircar. If Abdool Sircar did actually present this petition, his heirs cannot now say that the property was Abdool's own; nor can Boyd, who derives from Abdool's heirs, make such an allegation. Now, the evidence of a vakeel, Tajummul Hossein, taken in the Lower Court, proves that Abdool Sircar came himself to the Court house and executed there a vakalutnamah in favor of Pearee Lall Banerjee, another vakeel, on the strength of which the latter put in the petition in which Abdool Sircar acknowledges the property to be that of Haro Sircar, and avowed that he had acted as his agent in the purchase.

The Principal Sudder Ameen has believed this evidence, and the other witnesses who depose to the same fact; and he has discredited the story of the defendants that Abdool was too ill at the time to present such a petition. We altogether agree with the Lower Court in thinking that the direct evi-

dence as to the execution in person of Abdool's vakalutnamah and presentation of the petition, is more entitled to credit than the negative evidence on the side of the defendants. Moreover, the improbability is great that the plaintiffs, the sons of Haro Sircar, would have dared to put in, or cause to be put in, a petition in the name of Abdool Sircar, disavowing his title to the land during the life-time of Abdool Sircar, and when it was in his power to denounce the fraud at any time. It is more improbable still that a respectable man like vakeel Tajummul Hossein would have lent himself by his acts and his evidence to support such a fraud.

Abdool Sircar, then, who made the purchase, having himself admitted that he made the purchase in his character of trustee for the sons of Haro Sircar, the plaintiffs in this suit, his heirs, and Mr. Boyd who acquires through them are precluded from saying that the purchase was made by Abdool for himself and out of his own funds.

The plaintiffs are dissatisfied with the decree, because wasilat has not been allowed them from the date of purchase by Abdool on their behalf; but really the Lower Court has given wasilat in the only way practicable, *viz.*, in the shape of rent. Mr. Boyd was on the land before the purchase by Abdool, and he built a house on the land. It is not objected to that Boyd has been kept upon the land; and if the plaintiff gets from him a fair rent for the land, that is all he can reasonably expect. Under the circumstances, too, we think that there are good grounds for not awarding this rent in the shape of mesne profits from any date prior to the institution of the suit.

There is, therefore, no ground for any interference with the decision arrived at by the Lower Court, and we dismiss the appeal with costs.

The 20th February 1865.

Present:

The Hon'ble H. V. Bayley, J. P. Norman, and G. Campbell, *Judges.*

Auction purchasers (at Sales for arrears of Government Revenue)—Agreement by former owner to divide chur lands with other parties not binding on

Case No. 41 of 1861.

Regular Appeal from a decision passed by Mr. F. B. Kemp, Judge of Backergunge, dated the 20th November 1860.

Boykuntnath Chatterjee (Plaintiff), *Appellant,*

versus

Ameeroonissa Khatoon and others (Defendants), *Respondents.*

Baboos Unnoda Pershad Banerjee, Dwarkanath Mitter, and Kalee Mohun Doss for Appellant.

Mr. G. C. Paul and *Baboos Chunder Madhub Ghose, Romesh Chunder Mitter,* and *Ashootosh Dhur* for Respondents.

Suit laid at Rupees 9,919-0-0.

A purchaser at a sale for arrears of Government Revenue, suing to establish his right to chur lands which had accreted to the purchased estate, is not bound by an agreement entered into by the prior owner, with the owners of the adjoining estate, to divide the chur equally. Such an agreement is an alienation of or encumbrance on the purchased estate, and therefore under Section 26 of Act I of 1845, void as against the purchaser *(Dissentiente* Campbell, J.).

But *per* Norman, J., and Campbell, J.,—it would seem that purchasers under any of the Sale laws since Act XII of 1841, may be bound by a decree in a boundary suit against the prior owner.

Mr Justice Bayley.—In this case the former Appellate Court, without putting distinctly in issue whether the chur in dispute was an island, held, upon the general issue of whether plaintiff's claim to the land was valid or not, that the chur was an island, and that plaintiff's claim, therefore, could not be allowed. Now, plaintiff's case admittedly was that he was entitled to the land in suit as an increment to his estate; that it had been so settled after resumption; and that he had a right to so much of the chur as ran along the frontage of the parent property. It was also a part of plaintiff's case that as he was an auction-purchaser at a sale for arrears of Revenue, he was not bound by any act of the former zemindar making over any portion of what was a permanently settled estate to other parties, and that he had a right to the whole property in the estate at which it stood at the time that settlement was concluded.

It was further urged by plaintiff that, the Judge did not put in issue what was the area to which plaintiff would be entitled if the principle were admitted by the Court that the increment in front of plaintiff's original estate should be awarded to plaintiff. Plaintiff pleaded that the Judge, without fixing

this issue, decided the case solely on the view that the chur was an island, in which view the question of what was the amount of area to which plaintiff would be entitled, had the principle for which he contended been adopted by the Lower Appellate Court, could not arise; and that therefore plaintiff tendered no evidence on this point.

For the other side it is contended, that the resumption-decree shewed that the chur had the running river on three sides, and a non-fordable stream on the fourth; that the plaintiff was barred by the acts of his predecessor (the zemindar); and that the plaintiff was in laches in not giving evidence as to the area to which he deemed himself entitled as increment.

It was further contended that, as the resumed estate was brought on the Government rent-roll as a separate estate, it could not be claimed by the plaintiff as part of his parent estate.

I will *first* take the *admitted* facts:—

I. That the chur had a flowing river on three sides.

II. That it was resumed and settled; and that the malikana was paid to the zemindars who refused the settlement.

III. That it was brought on the Government rent-roll as a separate revenue-paying mehal.

IV. That the Judge held it to be an island and decided the case on that principle only.

The first disputed point in this Court is, whether the chur was resumed *as an island* or not, and I have no hesitation in saying that it was *not* so resumed.

The words relied on by the opposite party in the resumption-proceedings, are—"no one has any right except Government." But this is the ordinary phrase used when a resumption-Court decrees that the title to hold land rent-free is an invalid title. The context of the whole resumption-proceeding is that it was a simple ordinary decree to resume and assess; and it is somewhat surprising to me to see the pleader attempt to construe the decree otherwise. There is not one specific or definite word in the resumption-decree of the resumed land being resumed for Government *as an island*.

It is next disputed that the lands in suit after resumption were settled as an island, and malikana given to the opposite party as representing the neighbouring zemindars.

In the first place, if the settlement was as of a resumption of an island, pargraph 5 of the Settlement Proceedings would not specify (which it clearly does) that it was resumed, and settled *as an increment* to the permamently settled property named in that paragraph. Again, no one would have a right to malikana if the resumption was one of an *island;* because an island would be resumed as such, and then be at the disposal of Government, Here, however, on the contrary, the right is recorded as having been found in the zemindar, and so malikana has been given. Moreover, there is no mention whatever of any claim to it as an island having ever been brought forward or admitted. I also observe that the resumption settlement is of 4 plots. Plots 1 and 2 of these, it is admitted, were not termed *an island*, but 3 and 4, it is said, were so; yet in all the proceedings no distinction is made as to the four plots, which are all treated as of *one and the same* character. In the last place, the defendant's map makes the west boundary in the resumption a dhoon. The Settlement and Resumption proceedings call it a *drainage (jhara)* khal. Possibly, the Judge may have thought it, or it may have been described to him as *jari* (running) khal. Be that as it may, we have had no proof (but, as above pointed out, entirely the contrary) that the water on the four sides was a non-fordable stream so as to make the lands in suit an island.

On these grounds, I think, that the Judge is wrong in holding that it is an island.

I, further, am of opinion that plaintiff, as the auction-purchaser, is not bound by the ekrar or division made by his predecessor. Section 30 of Regulation XI of 1822 distinctly enacts that the purchaser shall get the estate in the same state that it stood when the Permanent Settlement was concluded. Now, the principle on which the title passed to the purchaser under Regulation XI of 1822, was not altered or repealed by Act I of 1845, although the procedure and other details as to sales were modified. This view is supported by the decisions of the late Sudder Court, especially that at page 1914, Decisions of December 30th, 1857. The words are—"We are fully of "opinion, in conformity with the principle "recognized in past decisions of this Court, "that a purchaser at a sale for arrears of "Revenue has *re-invested* in him the rights, "which, at the time of the Permanent Settle-"ment, were as to the proprietor as to the "Government, mutually secured." Again, at page 575 of Decisions of April 1857, we find, in regard to the rights of an auction-purchaser, these words:—"The doctrine of

"*res judicata*, which, under Section 16 "Regulation III of 1793, would have been "fatal to plaintiff's suit if the representative "of the former proprietor, cannot be pleaded "against one who is entitled to hold the "estate free of all encumbrances imposed "upon it either by the acts or through the "*litigation* of a former proprietor."

If this is the case in regard to decrees, how much more so in regard to acts not so ratified.

Thus I hold that the ekrar, which made over a portion of the former proprietor's estate to another party, is not binding on the auction-purchaser.

As to the fact of the mehal being made a separate number on the rent-roll at the choice of the zemindar, I have to remark that, if it had been *an island* and not an increment, no zemindar could have had such an option, for the Government would be the proprietor absolutely under Section 5 of Regulation XI of 1825.

The mode in which, for convenience, it may be arranged how the rent-roll shall stand, *i. e.*, with the resumed mehal incorporated with the number of the original mehal, or in separate numbers, cannot fix the principle on which rights based upon increment are governed. If there is a right as by increment or accretion, the right would remain, whatever the form of record on the rent-roll of the Revenue of the additional estate might be, or whatever the detailed arrangement under which its Revenue might be realized.

It only remains to refer to the question, whether, because plaintiff did not give proof of what was the area which he claimed, he is to lose all his rights?

His demand was for 150 droons by his right of increment in his original mehal; and for 60 droons more or less of land which would have attached to the parent estate, if the proper principle of allowing him so much as might run with the frontage of his estate, had been followed, and the improper alienation by the former proprietor had not been made. This point, appellant stated below, could best be enquired by local enquiry by an Ameen in this case, or even be ascertained on execution in the usual way by an Ameen also. It may be true that plaintiff might have been prepared with proofs of the amount of area claimed as above, but the principle of increment on which he claimed was ignored by the Judge, who decided entirely in favor of the view that the chur, being an island, could not come within plaintiff's claim of increment. The Judge would then have been acting most inconsistently if he had taken from plaintiff proof of the details of that claim, the principle of which the Judge had repudiated *in toto*, on the ground that the chur was an *island*, and not, as plaintiff claimed it, an increment.

I, therefore, do not see that plaintiff should lose all his rights, which, on the principle of increment, are undoubtedly his, only because he did *not* proffer evidence which could not be used by the Court after it had decided that the chur was an island.

On the whole, then, I think, there should be a local enquiry by a Court Ameen with a view to award to plaintiff so much of the land claimed as runs with the frontage of the original estate of appellant.

I would, accordingly, remand the case.

Mr. Justice Campbell.—This review was admitted, because the construction put by the Court (in the former decision) on a prior adjudication by the Collector of the proprietary right in the disputed land, proves to be, on an important point, erroneous.

The plaintiff sues for 60 droons of chur land and a further quantity of land (150 droons) added to the first accretion; but this latter question will, for the purposes of the present re-hearing, follow the first question, and we may, therefore, for the present purpose, consider the suit to be for the 60 droons I first mentioned. As respects the 150 droons, I would simply repeat the former order passed before the review.

It appears that plaintiff's estate and that of the defendant are conterminous on the banks of the river, and somewhat intermixed. A chur was formed opposite the two estates which both the zemindars claimed. Eventually, the former owner of plaintiff's estate and defendants settled the matter by agreeing to divide the chur equally between them, and a formal agreement to that effect was executed in the year 1242 (A. D. 1835) and was registered. A few years subsequently, Government found these lands to be in excess of the Revenue bearing lands, and, under Regulation II of 1819, obtained a decree to assess. Proceeding to assess, Government recognized the division of half and half made by the rival claimants then in occupation. But the zemindars declined the settlement offered to them. The chur was, therefore, put up for farm, and was taken in farm by the half-proprietors, the defendants. From the proceeds of the farm, malikana was and is paid to each proprietor in the recognized proportion of

half: and half. In 1858, 23 years after the amicable settlement of differences between the rival zemindars, the estate, now held by plaintiff, was sold for arrears of Revenue and bought by him. He now comes in as an auction-purchaser, saying that he is bound by no previous arrangements nor barred by any limitation, alleging that his estate should have got more than half the chur, and claiming the proprietary right in 60 droons of land which he states to be the excess quantity beyond one-half to which he is entitled.

The Judge settled the issues to be:—

1*st*. Is plaintiff barred by limitation?

2*nd*. Has the plaintiff any title to the lands the subject of this suit?

3*rd*. Is the plaintiff's title, if any, affected by his predecessor's agreement?

The Judge finds that the adjustment and agreement made by plaintiff's predecessor, the then holder of the estate, was unquestionably *bonâ fide;* and I entirely agree with him; in fact, there is no contest on that point, and it is clear the amicable adjustment made 23 years before the sale, could not to designed to defeat the subsequent purchaser, but was in fact made by the then holder of the estate acting in good faith for the best for his own interests. And this point is important, for I find that my learned colleague, throughout, assumes that plaintiff has clear rights in the land for which he sues, and that his predecessor gave away those rights; whereas I look on his predecessor's conduct and acts as very strong evidence that plaintiff's estate was never entitled to more than the half of the chur then assigned to it. The Judge finds in favor of plaintiff on the issue of limitation. On the *second* issue he found against plaintiff, that plaintiff has no title to the lands claimed.

On the *third* issue he found that plaintiff was bound by the adjustment made by his predecessor, and I must here observe that it seems to me that neither the issues nor the findings were quite those stated by my learned colleague. Plaintiff appeals from the Judge's decision on the 2*nd* and 3*rd* issues. On the *second* issue, it is to be observed, the plaintiff, asserting the technical right of an auction-purchaser, comes into Court seeking to rip up a *bonâ fide* amicable and equitable adjustment made nearly 30 years before. Such a suit is surely not entitled to be treated with any special favor. The plaintiff may reasonably be put to strict proof of his title. I ask him what proofs he has given? I find that there are on the record none whatever beyond a map of the *present* features of the ground on which he relies. It appears that plaintiff fancies that, taking his present map and measuring the original and accreted lands as they now exist, but excepting from the present state of things a navigable dhoon (which he says was formerly not navigable), the result would be on that basis to give him more than half the chur; and he now wants to have a local investigation and measurement and fresh opportunity of proving his claim.

But it seems to me that the Judge's issue was quite wide enough to bring in all plaintiff's proof of his title, if he had any; and that although one mistaken *element* seems to have crept into the Judge's reason for his decision (it was by no means the sole ground, as my learned colleague assumes), that mistake is merely in the judgment, and in no way affects the previously fixed issue upon which plaintiff was called on for his proofs. Eliminating, then, the mistaken reason (the Collector's supposed pre-adjudication before alluded to), it seems to me that plaintiff's map of the present state of things, even if it were proved, would not suffice to give a title in supersession of the adjustment made 30 years ago. Plaintiff would have to prove, not the present state of things, but the state of things 30 years ago; and, in fact, he so admits, for the now deep dhoon between the chur claimed (plots 3 and 4 of the settlement) and the other accreted plots, he seeks to show inferentially, from the words of the settlement proceedings, to have been at the time of settlement, *not* a deep dhoon. But thus getting rid of the part of the present map which does *not* suit him, he seeks to assume without one tittle of proof that all the rest which does suit him is, as a matter of course, the same as it was 30 years ago. The fact is, that a complicated chur-site like this on a great river, changes from one time to another like the changes of a Kaleidoscope. We may be almost certain that the features of to-day are not those of 30 years ago; land and water change in 50 ways. It would be almost impossible to ascertain by local investigation, what were the exact features 30 years ago. At any rate, plaintiff has not given a tittle of evidence to show what were the exact features of the site at that time, and to make out his title to the land claimed. It is true that Government did not assert a right to the newly-formed lands, but settled them with the adjacent proprietors found in possession. The plots 3 and 4 forming the present claim were, at the time of settlement, separated from the

others by a "Jhara Khal," which may or may not have been fordable. But that plaintiff"s estate was, at the time of the formation of the chur, entitled to more or less than one-half, there is not one tittle of evidence to prove. And as the case is, as I have said, not one in which the plaintiff is entitled to special indulgence, and, I believe, it would be nearly useless to refer it back for an impossible local investigation into the exact state of the land and water in 1242, I think further investigation unnecessary. On the other hand I think that even, if the agreement of 1242 be not binding on plaintiff, it is the strongest and most satisfactory evidence to show that at that date plaintiff's estate was not, in fact, entitled to more than one half of the chur. I, therefore, concur with the Judge in thinking that plaintiff has not proved his title to the land claimed; and, on that ground, I dismiss the appeal, except as regards the rights in the subsequent 150 droons awarded in the former decision.

On the 3rd issue taken in connection with the first on limitation, I also think that the plaintiff is shut out.

It is true that an auction-purchaser is, for many purposes, not the representative of the former proprietor, and that he takes free from limitation the estate of the time of the Permanent Settlement with its annexes and increments. He is not bound by the personal transactions of the former proprietor; and to protect the Revenue from fraud and alienations the law has specially vested in the auction-purchaser the right to avoid the encumbrances and alienations of the old proprietor. But, for certain purposes, I think that there is a privity between any actual holder of the estate and his successors, even although there is no continuity of title. I think that, just as one Sovereign for some purposes represents his predecessors even though he may have succeeded by revolution, so in respect of such matters as the mere boundary dispute involved in this suit, and in regard to all matters which do not involve detraction from the estate, but only a settlement in good faith of its limits, rights, and privileges as between that estate and other estate. I think that the acts and settlements of any holder of the estate done diligently and in a faithful performance of the duty of a good landlord, with due regard to the interests of the estate, bind and ought to bind all his successors by whatever title. When there is, as here, a dislocation of the title, I would require proof that the former holder acted in such good faith as to make him fairly and equitably a privy of the present possessor. But when, as in this case, that is fairly established, I would not allow an auction-purchaser or any one else to rip up all the old quarrels already fairly settled.

Moreover, as the law has given a certain special protection and facility to auction-purchasers for a certain purpose, I think that they should be confined to the privileges which the land has expressly given to them for that purpose, and should not be allowed to claim a privilege (which the law does not give them, and which in no way answers that purpose) of re-opening every old lawsuit, and making themselves a pest and injury to all their innocent neighbours. When I turn to the law under which this estate was sold (Act I of 1845 Sections 26 and 27), I find that the law gives power to the auction-purchaser to *void encumbrances* and *alienations;* but I cannot bring, within the powers so given, the right to re-open a boundary dispute already fairly settled, and that, I think, is no encumbrance or alienation. I, therefore, think that plaintiff is bound by the previous settlement of his claim, and that he is barred by a limitation of more than 12 years; and, on this ground also, I would dismiss the appeal with the exception noted in my finding on the 2*nd* issue.

Mr. Justice Norman.—This is a case in which Mr. Justice Campbell and Mr. Justice Bayley differ on a point of law, which is referred for my decision.

The plaintiff, who became the purchaser of a talook 1988 at a sale for arrears of Government Revenue, on the 8th of February 1858, sues to establish his rights in respect of certain chur lands, which he claims as having been accretions to the purchased estate.

The plaintiff's estate and that of the defendant are conterminous estates situate on the banks of a river. A chur was formed opposite to the two estates, which the owner of each claimed. Eventually, the former owner of the plaintiff's estate and the defendants settled the dispute by agreeing to divide the chur, and a formal agreement to that effect was drawn up in the year 1835. A few years subsequently, the Government found these lands in excess of the lands paying Revenue, and under Regulation II of 1819, obtained a decree for assessing them. The Government recognized the division of half and half. The zemindars declining the settlement offered to them

the lands were let in farm to the defendants; and from the proceeds, malikana has been paid to the former owner of 1988, and allowed to the defendants in equal moieties.

The question is how far the plaintiff is bound by the arrangement of the former owners of his purchased estate.

In considering this point, it is desirable to consider how and in what manner the purchaser, at a sale for arrears of Government Revenue, may be bound by the acts of the preceding owner of the land.

Regulation XI of 1822, Section 29, contains a *recital* that "since the act of sale transfers to the purchaser all the property and the privileges which the engaging party possessed and exercised at the time of settlement, free from any accidents, or encumbrances that may subsequently have been imposed, or have supervened thereupon, such as sale, gift, or other transfer, mortgage, marriage-settlement, or other assignment, or the like, the property and privileges possessed and exercised as aforesaid being perpetually hypothecated to Government for the revenue assessed thereon." And then follows the *enactment* that "no claim of right founded on any act of the original engager or his representative, or *on any plea* impeaching the title by which the said engager may have held, shall be allowed to impugn the right of the Revenue Authorities to make the sale, or to bar and affect the title and interest conveyed to the purchaser by the sale."

The whole Section is repealed by Act XII of 1841. The Sudder Court in Luchmee Khan *versus* the Collector of Rajshahye, (S. D. A. Rep. 1851, page 116), expressed an opinion that the Section in question was declaratory, and therefore that the rule would stand though the Section was repealed. But they failed to distinguish between the *recital* as respects which their position may be true, and the *enacting part* of the Clause which stands on a totally different footing. Act XII of 1841, reciting that it was expedient with a view to the agricultural community *inter alia* to amend the laws for the realization of the land Revenue, not only repealed the Section in question, but does so for the purpose of substituting by Section 27 a very different and much less stringent enactment, *viz.*, that "the purchaser shall acquire the estate free from all encumbrances which may have been imposed upon it after the time of settlement," subject to exceptions therein mentioned. Act I of 1845, under which the sale in the present instance took place, by Section 1 repeals all the Sections of Act XII of 1841, except the two first. But by Section 26, the provision of Section 27 of Act XII of 1841 is re-enacted.

The Sudder Court in accordance with the construction put by them on the Regulation and Acts now under consideration in the case above cited, in the latter case of Baboo Prosonno Coomar Tagore *versus* Gobindnath Goopto (S. D. A. Rep. 1851, page 731), held that a purchaser at a sale for arrears of Government Revenue under Act I of 1845 is "not the representative of the former proprietor, and is not bound by the decrees which would bind him or those who acquire their rights by title from him." They say—"such decrees, if given upon litigation honestly pursued, would deserve the fullest attention and, of course, have important weight in considering the effect of the evidence adduced, or pleas raised by a new auction-purchaser; but the case, as brought by the auction-purchaser, must be carefully gone into, and a judgment passed upon all its facts." In that case, the party to the litigation whose estate the plaintiff had purchased, was himself an auction-purchaser; and in the subsequent case of Bibee Khyroonissa *versus* Baboo Delbuksh Narain Singh (S. D. A. Rep. 1857, page 574), the Court say—"the precedent seems even to go the length of admitting the legality of a series of actions for the same matter by successive auction-purchasers," I may add—Very unreasonable and inconvenient if correct. But I entertain very great doubts as to the correctness of the *dictum* in the former case, and of the above two decisions founded upon it. It appears to me that, if the language of Act I of 1845 is to be considered, a decree passed against an owner of property determining his rights, cannot, in any sense, be called "an encumbrance" created by him, unless it be shewn that he has himself collusively and for fraudulent purposes procured it. If the question be considered with reference to general principles of law, it is an entire mistake to suppose that none but the representative of the prior owner, can be bound by the results of litigation and adverse decree against him.

In a passage of Coke upon Littleton 352 *a*, which is always cited as the law on this point (*see* for instance the judgment of Lord Ellenborough in Outram *vs.* Morewood, 3 East 346, and the notes in Smith's Leading Cases on Doe *vs.* Oliver) it is said—"Privies

in law as the Lord by escheat, &c., the incumbent of a benefice, and others who come in by act of law in the *post* (*i. e.*, as successors to the property including persons not claiming title under the preceding owner,) shall be bound by and take advantage of estoppels." Regulation XI of 1822, Section 29, protected an auction-purchaser from a claim of right founded on any act of the original engager, *or any plea* impeaching the title by which the said engager held. And therefore perhaps the general rule did not apply while that Regulation was in force. But the enactment has been repealed, and, as it appears to me, probably with the intent of avoiding such mischiefs as are alluded to in the decision of the Sudder Court in 1857.

Several other cases which were mentioned in argument turn on questions of limitation. Bibee Khyroonissa *versus* Baboo Debbuksh Narain Singh (S. D. A. Rep. 1857, page 574), Hurdyal Singh *versus* Bhudwanee Singh (S. D. A. Rep. 1858, page 470), Bhowannee Sunkur Singh *vs.* Mussamut Biddaruth Koonwur (S. D. A. Rep. 1857, page 1913). They may be dismissed with the general remark that, when carefully examined, they will probably appear to be merely illustrations of the position that, for purposes of limitation, the cause of action of a purchaser at a sale for arrears of revenue, suing for possession of any part of his purchased estate, dates from the completion of the purchase.

In the present case, we have not to deal with a decision against the prior owner in a boundary suit, or even the private compromise of such a suit by an adjustment laying down a definite boundary as an agreed line separating the two estates; but with a contract by which, I understand, the parties thereto agreed to a division of the chur half and half. It appears to me clear that this *ekrar* or contract, however just in itself, can only be binding on the parties to it to the extent of their interests; and that the auction-purchaser is not in any manner bound to abide by the stipulation of the prior owner. So far as the prior owner gives up by it any portion of his rights, it is an alienation; and so far as it may give to each party joint rights over the whole chur instead of a defined boundary, it is clearly an encumbrance on the purchased estate within the meaning of Section 26 Act I of 1845, and is, therefore, void as against the auction-purchaser.

I think that the plaintiff has a right to ask to have the case remanded for the purpose of taking evidence by a local enquiry or otherwise, in order that the extent of his rights in the chur may be ascertained. The agreement of 1835 may afford some evidence that the parties were at that time interested in equal moieties in the chur. But, on the other hand, it seems to me to afford very little ground for inference as to what are the rights of the parties at the present time.

Remand accordingly.

The 20th February 1865.

Present:

The Hon'ble H. V. Bayley and Shumboonath Pundit, *Judges.*

Limitation (Section 77 Act X of 1859)—Suit for possession—Joint Hindoo Family (Evidence of School of Law prevailing in)—Adoption of Law of country of domicile as to succession.

Case No. 341 of 1864.

Regular Appeal from a decision passed by Baboo Tara Kant Biddiabagish, Principal Sudder Ameen of Jessore, dated the 23rd June 1864.

Chundro Seekhur Roy (Plaintiff), *Appellant,*

versus

Nobin Soondur Roy and others (Defendants), *Respondents.*

Baboos Khetter Mohun Mookerjee, Kishen Kishore Ghose, and *Sreenath Doss* for Appellant.

Baboos Aushootosh Chatterjee and *Taruckнath Sien* for Respondents.

A, having a certificate under Act XX of 1841 (to collect debts due to the estate of his uncle), sued two of the tenants of the landed property belonging to the estate, and his claim was, on the intervention of B, dismissed under Section 77 Act X of 1859. A, more than a year after this decision under Section 77, (computing that time after making a deduction under Act XIV of 1859 for the whole period that the rent case under Act X had remained pending), brought a suit for possession of the whole estate.—HELD that the subsequent claim of A was not barred by the limitation of one year mentioned in Section 77, but only his right to demand the particular amount of rent for which his claim against the two tenants was dismissed under that Section.

A had sued alleging that he was in possession of the estate of his uncle from the time of the death of his uncle's widow, and that he had since been dispossessed on a particular date.—HELD that the suit being for possession within 12 years of the death of the widow, he was entitled, on proof of his title to suc-

ceed to his uncle, to recover possession, though he had failed to prove his alleged previous possession.

In a joint Hindoo family, the admission of the plaintiff's ancestor who, if the Mitakshara school of Law prevails in the family, would be the heir—to the effect that the widow of the deceased was entitled to succeed to her husband—is the strongest evidence to show that the Bengal Law is really the law of the family.

Proof of the fact that, in matters connected with succession, the law of the country of domicile has been adopted by a family, negatives any presumption arising from the observance of ancient customs in other matters.

THE appellant, the sister's son of the deceased Totaram Purdhan, on the 13th of October 1863, sued Nobeen, the party in possession, and others, for the estate of his maternal uncle, alleging that Soobhudra, the maternal aunt of the plaintiff, who had succeeded to the estate of her husband, died in Kartick 1258 B. E., correspondig with November 1851; that having obtained a certificate under Act XX of 1841, for collecting the debts due to the estate of his uncle, he sued two of the tenants of the landed property in dispute for certain rents, and obtained decrees; that, on the appeal of the tenants, the Zillah Judge, on 7th November 1861, dismissed plaintiff's claim; that accordingly he has been dispossessed by the said Nobeen from the whole of the lands belonging to the share of the aforesaid Totaram.

The defendant, Nobeen, answered that Ramdhun Purdhan had two sons, Totaram and Boidee Nauth, that the defendant was the adopted son of Neel Comul, the son of Chundee Churn, the son of the said Boidee Nauth; that, as succession in the family is guided by the Mitakshara School of Hindoo Law, plaintiff, as the sister's son of Totaram, has no right to the property in suit; that the decree of the Judge of Nuddea was dated the 7th November 1861, being in a case for rents in which the defendant had intervened under Section 77 of Act X of 1859, and the present action of the plaintiff was instituted more than one year after the aforesaid date; that the suit is, therefore, barred by limitation; that Totaram and Boidee Nauth were in joint possession; that the former, shortly before his death, aware of the fact that succession to his estate would be guided by the Mitakshara Law, and that his widow had, therefore, no right to succeed him, gave his property (verbally) to Neel Comul, his brother's grandson, who was his heir; that from that time the said Neel Comul, defendant's father, held the estate of Totaram, first through his trustee, the widow of Totaram, and afterwards himself till his death, which occured in Bhadro 1254; that after this the defendant being adopted, remained in possession of the entire estate (including the share formerly held by Totaram) first through his trustee, the said widow of Totaram, and afterwards through other trustees and executors until he became major, when he took possession himself; that the plaintiff was never in possession of the share held by his maternal uncle; that his present action for that share is subject to the general law of limitation; that the widow of Totaram never held possession as heir to her husband; that the case brought before against the defendant through Ubhoy Churn as one of the sister's two sons of the said Neel Comul, to set aside the adoption of the defendant, was instituted under the direction of the present plaintiff, but the claim of that plaintiff failed.

The Lower Court, on 23rd June 1864, dismissed the claim of the plaintiff, on the ground that the succession in the family being guided by the Law of the Mitakshara School, plaintiff has no right. The Court below had first overruled the defendant's objection regarding the applicability under Section 77 of Act X of 1859 of the limitation of one year to the entire claim of the plaintiff. The opinion of the Court on this point is in these terms;—"It appears that "two separate suits for arrears of rent were "brought in the Collector's Court by plain- "tiff against two tenants of the said gan- "tee jumma, Chundi Churn Holdar and "Ramjee Sirdar. In those actions the de- "fendant, Nobeen Soondur, appeared as in- "tervenor on the allegation of his own right "and possession. In appeal the Judge dis- "missed the plaintiff's claim. Subsequent "to the order of the said Judge, which was "passed on 7th November 1861, plaintiff, "on 5th April 1862, brought two Civil "suits to establish his right to the two "jummas above alluded to. The Moonsiff of "Bongram, on 28th July 1862, dismissed the "said cases in the form of non-suit, on the "ground of the whole of the disputed pro- "perty not having been included in the "claim. On appeal the Principal Sudder "Ameen, on 19th December 1862, up- "held the decision of the Moonsiff. Subse- "quent to this the plaintiff filed his plaint "in the present case on 13th October 1863. "It also appears that, after the appeal above "alluded to had been decreed by the Judge, "plaintiff, on 30th April and 10th May 1862, "obtained decrees or arrears of rent against "other tenants of the gantee in dispute

"In all these cases, likewise, Nobeen Soondur Purdhan appeared as an intervenor, "but his objections were disallowed; copies "of the decisions made in the above suits "are put up with the records of the present case. The present case has been "virtually instituted for a disputed title "of inheritance. In my opinion this claim "for the entire property in suit, has not "been affected by the rule of limitation, "despite the proceedings under Section 77 "Act X of 1859."

The Judge below then admits that the case is not in time, even if the period during which the former cases brought before the Moonsiff were pending; but adds that, when 12 years are allowed from the date of the cause of action in suits for recovery of possession of lands, it is not proper to bar the claim of the plaintiff to the extent of the two jummas, the rents of which were disputed before the Collector, and disallowed on appeal by the Judge of Nuddea.

On the question of the applicability of the Mitakshara School of Law, the Judge below has recorded as follows:—

"It appears that Totaram and Nobeen "Soondur are not native Brahmins of Ben"gal, but of the North West, whence their "ancestors came and took up their abode in "this part of the country. The Prodhan fa"mily have not up to this time married any "daughters of the Brahmins of Bengal or "those of any caste beside. From the evi"dence of witnesses of both parties, it ap"pears that their priests are Mithilla Brah"mins. It is a different question altogether "when men are left without any alternative. "The course they then adopt can never be "taken into account. It admits of no doubt "that the Mitakshara Law does and shall "apply to the people of the (North) West. "It would be opposed to practice and equi"ty to hold that for the reason of the said "Prodhan family having been residents in "Bengal, they have become Bengalees, and "are to be governed by the Laws of Bengal."

The Court then refers to the case brought by Ubhoy for the share of Boidee Nauth, the brother of Totaram deceased, and states that in that case it was decided on 31st December 1862 by the High Court, that the Mitakshara Law prevails in the family. The Judge then records:—

"It is known that Ootum is the priest of "the Prodhan family. He has distinctly "admitted in the above suit the facts of the "Mitakshara Law prevailing in that family. "It can never be supposed that the above "decision was collusively secured in order "to destroy the right of the plaintiff. When "Totaram Prodhan and others are people of "the North West, and it has been held by the "High Court that the Mitakshara Law pre"vails in their family, it would be highly ille"gal, *in the absence of very strong proofs*, to "apply the Dayabhaga. Plaintiff has not been "able to adduce any cogent proofs, on the "strength of which it can be held that the "Dayabhaga prevails in the family of the Pro"dhans. The same sort of oral evidence, which "plaintiff has adduced, has also been adduced "by the defendants, so that the Court cannot "find any difference in the nature of the two. "*It is a known fact that Soobbhadra the wi"dow of Totaram, long held possession of "the poperties as trustee on behalf of No"been Soondur and his father.* There is no "evidence on the record to show that Soob"bhadra held separate possession of the 8 anna "share of Totaram, for which this claim has "been brought. The paternal grandfather of "Nobeen demised very shortly after the death "of Totaram, and Nobeen's father was a minor "for a considerable time. Therefore, even "if Soobbhadra had held possession of "the said 8 annas share as distinct and se"parate from other share during the above "interval, such possession cannot be pleaded "against the right of Nobeen. Again, in "the plaint (copy of which is put up with "the record) of a suit brought by Soobbhadra "on the 29th Poos 1255, before the Moon"siff of Kaguz Pookoorie, against a certain "tenant of the disputed grantee jumma, "she has stated in most distinct terms that "the above jumma belongs to the defend"ant Nobeen. Besides, when Soobbhadra, "on account of her old age, constituted Oo"tum Chunder and others executors on "behalf of Nobeen Chunder of the entire "properties, she did not set any property as "exclusively belonging to herself. For all "these reasons, and on reference to other "proofs, it appears that, for upwards of 12 "years before institution of this action by "the plaintiff, a possession, on behalf of "Nobeen and his father, of the disputed "properties, continued to be held with the "consent and knowledge of Soobbhadra."

Against this decision, the plaintiff has appealed, and the respondent has, under Section 348 of Act VIII of 1859, asked for the trial of his objection regarding the application of the limitation of one year mentioned in Section 77 of Act X of 1859. It is admitted that even after making an allowance to the plaintiff, which he is entitled to

under Act XIV of 1859, for the period that his two Civil cases preceding this suit, were pending up to the final decision, the present suit is after more than a year allowed by Section 77. Now, Act XIV of 1859 rules that when periods of limitation shorter than those mentioned in the said law, are allowed by any other law, those shorter limitations are to be considered in force for the cases to which they apply notwithstanding that Act XIV was passed after Act X of 1859. When this suit was brought, the former law had come into operation; and although generally for cases of possession of lands a period of 12 years is allowed by the later law, still, when this action was brought, the limitation for a Civil suit, as provided for in Section 77 of Act X of 1859, had not ceased to have effect. But this view will not affect the entire suit of the plaintiff. It will, however, do so to the extent of rents asked by the plaintiff in those two cases for the holdings of the two tenants against whom his claim was dismissed on appeal; and thus his present action is so far barred as brought more than a year after the decision passed against him under Act X of 1859.

We hold that the Section never contemplated that the effect of a decree for rents claimed from one or two out of several hundreds or thousands of ryots awarded to an intervenor, should be considered as an estoppel to the right of the party cast to sue for the possession of the *entire* property, if he does not sue within a year of the decree in the *rent* case, though from the nature of the case the plaintiff may, when he sues in the Civil Court, have occasion to sue for his title to the *whole* estate, and not simply to recover his rents from that one tenant or those two tenants. In this case the plaintiff has also obtained decrees against some of the ryots, notwithstanding the intervention of the said Nobeen.

The plaintiff had sued to set aside the decisions of the Judge in the two rent cases against the two tenants within a year of the said final decision; but he was directed to sue in one case for his title to the entire estate. We have no reason to believe that the plaintiff was ever in possession of any portion of the estate of his paternal uncle; but he is in time from the death of the intervening widow, whose demise it is which gives him the right to sue as has been frequently ruled by this Court. No cause of action could have arisen to the plaintiff before her death. We do not find that she put herself forward from the time of the death of her husband down to the death of her husband's brother's grandson, as holding for Nobeen's father, Neel Comul.

On the merits we observe that in the suit instituted by Obhoy, the sister's son, one of the two brothers and the other brother appeared as defendant, and admitted with some attempt of explanation that he had acquiesced in the adoption of Nobeen, and had acted as attorney for him. Neither the allegation of the verbal gift, nor the assertion regarding the adoption, was then tried; but it was assumed that Totaram had survived Chundi Churn, the son of Boidee Nauth.

Of the witnesses produced by the plaintiff in this case, only one was examined in that case; and Ootum, the witness, relied upon in that case, is not examined, nor a copy of his deposition produced in this suit, and it is not shown that he is dead. The Judge below was not, therefore, authorized to make that use of the evidence of this witness, which he appears to have done. The will of Chundi Churn registered before his death, and not denied by the other party, does not appear to have been filed or considered in the former case. It has now been proved that Chundi Churn was alive when Totaram died. Now it is shown to us that Chundi Churn (after allowing Soobbhadra to obtain possession of the property of her husband, who was admittedly holding jointly with him) did, by his will dated 13th Agrahan 1232 and executed a few days before his death, pass his own share of the ancestral property, and of his own self-acquired property to be inherited by his minor son, Neel Comul, and appointed the aforesaid Soobbhadra, his aunt, and his own widow, Deeno Monie, guardians and managers. In this Will, which was registered about two months after the death of Chundi, he makes no allusion to the share of Totaram having come to his son by a verbal gift, and the omission of any direct allusion to the succession of his aunt to the property of her husband, is the best proof in support of the plaintiff's claim. As far as Chundi Churn was concerned, and understood his own rights under the Law of Succession prevailing in his family, it is clear he had no reason to entertain any doubts, and accordingly he had no occasion to allude to a fact which was considered as the effect of the undisputed legal rights of his aunt.

It is quite clear that the Judges deciding the former case did not believe in the asser-

tion of Nobeen that Soobbhadra never held as the widow of her husband, but, on the contrary, had distinctly decided that she did so. On this point they, however, remarked:—"It is admitted, however, on all "hands that if the plaintiff could show from "the history of the family in recent times "that, in such matters as marriage, adoption, "inheritence, and the like, they had practically followed the law of Bengal, such proof "would render the kind of evidence which "we have been discussing of very inferior "importance. We find accordingly in the "second branch of evidence, that one example of conformity to the Bengal Rule of Succession is brought forward on the plaintiff's "side. This is the inheritance of Soobbhadra, a "childless widow, to the share of her husband "Totaram, who died in 1232 Pous, the elder "brother of Boidee Nauth from whom plaintiff and Nobeen Soondur (supposing that his "adoption *stands*) are both descended. This, "it is admitted, could not have taken place "in a joint undivided Hindoo family under "the Law of Mithila. *A fact so important of "course demands investigation*, and we find "the proof of it consists in a decree of the "Provincial Court of Moorshedabad, under "date the 19th November 1829, in which "Musst. Soobbhadra is set down as the widow "and representative of Totaram deceased, "who had been one of the original defendants. "This appears to have been a suit connected "with a putnee talook in which the Paul "Chowdry zemindars were plaintiffs. The "other defendant was Deeno Moyee, the widow of Chundi Churn, mother of Neel "Comul, who represented Boidee Nauth, the "younger brother of Totaram, who had died "14 years earlier; and in accordance with "this state of things, petitions dated the 30th "March 1827 and 8th May 1833 have been "filed as coming from Soobbhadra and Deeno "Moyee, relative to the payment of rent for "this talook. It is to be observed that "there was neither adjudication nor dispute "upon this matter of succession. Now, we "are not disposed to think that the mere "assumption by Soobbhadra of rights which, "if the family were still Mithila, did not belong to her, would be in itself extremely "important, *unless it were shown that other "heirs at that time existed, whose rights "were affected by her proceedings, and who "were in a condition to resist. If this in-"deed were so, the silence of such heirs "would be very significant.* But we find "the death of Totaram took place in "1232, *just one month after that of his "nephew and male heir Chundi Churn*, "when the grand nephew and next heir "of Neel Comul, son of Chundi Churn, was "a child in arms (born 1231), his mother "Deeno Moyee being his guardian. Under "these circumstances, nothing could be more "probable than that Soobbhadra, having only "a young widow to deal with, should assume "the direction of her deceased husband's "share in the property, and continue in possession of it until Neel Comul came of age; "and, as remarked by the Appellant's vakeel "*there is no evidence of her possession after "he attained his majority.*" In another preceding part of the decision, the Judges had observed—"We have to consider whether the "Judge was right in coming to the conclusion that the Law of Bengal ought to "prevail in the present case. The evidence "upon such a point as this must in general, "be, and in this case is, divisible in two "classes: *first*, oral evidence descriptive of "the ceremonies and usages observed in the "family at the present time, and within "the personal knowledge of the witnesses; "and *secondly*, the evidence of facts "derived from the family history, such as "their intermarriages, successions, acts, and "admissions in Court and the like, which "are by far more valuable, as being definite "and practical professions of custom, and "for the most part admiting of no dispute. "If the plaintiff can shew that, in matters "connected with succession, the law of the "country of domicile has been adopted, the "presumption, arising from the observance of "ancient customs (if such observances were "proved), would at once be negatived."

The admission in the Will of Chundi Churn regarding the right of his aunt to the estate of her husband, affecting his own rights to the estate of his said uncle, is the best proof of what is the School of Hindoo Law prevalent in the family. This, further, is binding upon the defendant who claims through the said Chundi Churn. In the former case it was wrongly assumed that Totaram survived Chundi Churn. It has been proved by evidence in this case that Chundi Churn survived Totaram. According to the recent plaint of the plaintiff, the gift was made by the said Totaram in favor of the son of Chundi Churn, because Chundi Churn had already died at that time; and accordingly there was no heir to Totaram other than Neel Comul, the infant son of Chundi Churn. The evidence given by the defendant in support of the alleged gift to his father, supports the same theory. The

plaint filed by the Paul Chowdhries against the widows of Totaram and Chundi Churn, describing them respectively in possession of the estate of Totaram and Chundi, we admit, is no proof against the defendant; but the answer to the appeal filed in this case by these two widows, as recited in the said decree, shows that the widow of Totaram did not then make any statement from which it could be understood that, after the death of her husband, she was holding otherwise than as his widow and successor. The two petitions bearing orders, dated respectively 30th March 1827 and 25th January 1833, filed by these widows, support the same view. The Will, read together with these admissions of Soobbhadra, distinctly places it beyond all doubt that, when Chundi Churn made his Will, he knew that he held *only half* of the joint ancestral property, and that he was not entitled to the other half share left by Totaram, which his aunt was entitled to hold, and was holding as a widow, and as capable of doing so under the Bengal School of Hindoo Law. That Chundi might have referred only to his own share, on the ground that the share of Totaram was conveyed before by a gift to Neel Comul, is a line of argument which the defendant cannot be allowed to take without the gift being proved. Further, the fact of the verbal gift to Neel Comul is urged by the plaintiff as the consequence of the alleged death of Chundi Churn before the demise of Totaram.

When this allegation has turned out to be false, the allegation of the gifts becomes worthless. Besides, when Chundi Churn survived Totaram, we cannot believe that the widow of Totaram managed the property conveyed by her husband to his brother's grandson in preference to his parents, both of whom were alive. If the gift falls, the omission in the Will of Chundi Churn regarding the possession of his aunt, and the fact of Chundi Churn's own share alone being alluded to in it, become highly significant. The onus is properly upon the plaintiff. We think that this plaintiff has proved his case, and discharged himself of it. When the fact is not known by which School of Hindoo Law succession among those who have migrated from a different country is guided, it is to be presumed that the old Law imported with the family still prevails until the contrary is shewn by the opposite party. Here the fact of the law by which inheritance in the family of the parties is now guided, is directly deposed to by witnesses of the plaintiff; and their testimony being believed, it is not so material to enquire into every detail of the manner in which the essential ceremonies are performed.

The plaintiff has clearly shewn by the evidence of kins and relatives, that in the family of the parties before the Court, in several cases where succession, according to the Bengal Law, was to go to one, and according to the school of *Mitakshara* to another, the succession was according to the former or Bengal School. It is proved that the ancestors of these parties migrated into this country about twelve or thirteen generations ago, with a few of their own priests. It is quite natural that some among them may still have for their priests descendants of the original family priests; as the descendants of these priests cannot find it convenient to attend upon and accompany all the numerous descendants of the original emigrants scattered by degrees in different places from time to time, to many of the later generations, it is only left to accept the Bengalee priests available. Thus, too, the descendants of the family priests by degrees, after a few generations, acquiesce in performing the external ceremonies (or *kria*) according to the Bengal School. In such cases the Nagree character is abandoned for Sanscrit writing after 5 or 6 generations; old habits and customs fall one by one; and the priests and their jugmans both gradually become Bengallees in every sense. In this state and change for a long time, even after a complete conversion, the priests and their *jugmans* remain in theory a separate class, though for all other practical purposes, either of ceremonies, or of succession, they have long adopted the Bengallee School of the Hindoo Law.

Such emigrants may become Bengallees in their ceremonies, but cannot and would not be allowed to intermarry with Bengallees or their own class. The fact, therefore, of want of proof of intermarriage with Bengallees, or the fact of some families of the descendants of these original emigrants having still for their priests some of the descendants of the priests that had accompanied their ancestors, does not afford proof in support of the fact of the original laws and customs being still observed by these people as a class and tribe. The witnesses for the plaintiff distinctly state that the necessary rites in the families of both the parties are now performed according to the Bengallee School; and, what is more important, they distinctly swear to the fact that within their

knowledge, succession is guided by the same school. The evidence given by the defendant to counteract this case of the plaintiff is the deposition of two witnesses who are not of the family or of the tribe to which both the parties belong, and who distinctly admit that they are ignorant of the School of the Hindoo Law under which succession is guided in the family. It is to be borne in mind that the fact of some members of the family having Bengalee priests is by itself a strong proof of all having adopted Bengalee ceremonies for all essential ceremonies, though it is admitted that these persons of different branches of the original family intermarry only among themselves. It is clear that generally there can be no intermarriage between two classes of people who perform their essential rites, such as marriages, funerals, tonsure, &c., under two different schools of Hindoo Law. When these people are found to have lived here so long as to have by degrees adopted the language, the dress (particularly for women), and the ordinary food for the people of Bengal—the two last of which are materially different in the two countries among such people, when all intercourse and intermarriage with the parent-country has long ceased—it is nothing surprising that they should be proved, as deposed to by competent witnesses, to have by degrees been compelled to abandon their old forms of ceremonies now impracticable, and what is of more importance of having, whenever such a contingency arose that one more nearly allied was not the heir by their old Law,—allowed him or her to succeed according to the Laws of Bengal.

The cases of succession quoted by the witnesses of plaintiff do not, as to the rights of the daughter's son, shew sufficiently clear proof of the statement of the plaintiff with regard to the application of the Law of Bengal as these witnesses were not made to state that, when such succession took place to the deceased, he was a member of a joint family. There cannot, however, be any mistake regarding the succession of a sister's son. He has no right to succeed except under the Law of the Bengal School. It is important that more than two instances of such succession were pointed out by the witnesses. The defendant has not contradicted the fact, or proved that, in any other similar cases of succession, any other rule of succession was adopted. The instances given by the witnesses took place in the class to which both the parties belong, and the statement of the plaintiff is corroborated by the fact of Soobbhadra's undisputed succession in that very branch of the family of which Tota and his brother were the members. Some attempt was made to raise doubts regarding the correctness of the claim of the plaintiff, on the ground that he asserted wrong facts in his case, and did not venture to bring his claim for more than 10 years after the death of Soobbhadra, and that he had pleaded otherwise in the other case brought against Nobeen. But in the face of such clear proof of the Law of succession applicable to the family as now found by evidence, we cannot attach any importance to this objection. It is not at all surprising to find that plaintiff at first entertained doubts regarding his ultimate success, and so delayed to sue for that or other reasons.

Be that as it may, he has now succeeded in producing the best and most unexceptionable evidence and so proved his case. The delay of a plaintiff in such a case would not debar him of his rights, when duly proved as they now are, and when defendant really in no way rebuts the case by sufficient evidence to support his (defendant's) case. Some stress is laid by the Judge below on certain statements of Soobbhadra regarding her possession of the property of her husband being only in the capacity of a trustee for the defendant; but these statements, so clearly opposed to her own previous assertions and acts proved in the case, and made at a time when there was no dispute in the family previous to the death of Neel Comul (which event alone, by giving an opportunity to Ubhoy, the sister's son of the deceased, to urge his clamis, gave rise to disputes), are not entitled to any weight.

On all these grounds we are compelled to decree the appeal of the appellant with costs, to reverse the decision of the Lower Court, and decree with costs the claim of the plaintiff for the estates of his maternal uncle Totaram as asked, except the rents of the two jotes, his claim for which was dismissed by the Judge of Nuddea, on the 7th of November 1861.

The Weekly Reporter,

APPELLATE HIGH COURT.

No. 11.] APRIL, 1865. [Vol. II.

The 22nd February 1865.

Present :

The Hon'ble Sir Barnes Peacock, Kt., *Chief Justice*, and the Hon'ble C. B. Trevor, G. Loch, H. V. Bayley, J. P. Norman, W. Morgan, and G. Campbell, *Judges*.

Lakheraj (Assessment or resumption of, created after 1st December 1790)—Limitation—Onus probandi.

Case No. 869 of 1864.

Special Appeal from a decision passed by the Additional Judge of Hooghly, dated the 30th January 1864, affirming a decision of the Principal Sudder Ameen of that District, dated the 14th April 1863.

Sonaton Ghose and others (Defendants), *Appellants*,

versus

Moulvie Abdool Turrub (Plaintiff), *Respondent*.

Mr. R. E. Twidale and *Baboos Juggadanund Mookerjee* and *Toolsee Doss Seal* for Appellant.

Baboo Mohendro Lall Shome for Respondent.

The limitation prescribed by Section 28 Act X of 1859, applies only to suits brought under that Section.

A suit brought under Section 10 Regulation XIX of 1793, to assess or resume invalid lakheraj created subsequent to 1st December 1790, is exempt from limitation.

In such latter suit the *onus* is on the plaintiff to show that the case is one falling within Section 10 Regulation XIX of 1793, or, in other words, that the grant was subsequent to 1st December 1790.

THE plaintiff in this suit, which was commenced on the 31st December 1861, alleges that he is a durputneedar; that there is a certain quantity of land, part of his mâl land, held by the defendant under the false pretence that it is lakheraj; and that the lakheraj was created in the time of a former talookdar by fraud. The defendant pleads that the suit is barred by the Statute of Limitation; and the first question we now have to decided is, whether or not it is so barred, assuming that the grant was subsequent to the 1st December 1790? If the case is one falling within Section 10 Regulation XIX of 1793, we are of opinion that the suit is not barred. Section 10 enacted that "all grants for holding land exempt "from the payment of revenue, whether "exceeding or under one hundred beegahs, "that have been made since the 1st December 1790, or that may hereafter be made, "by any other authority than that of the "Governor General in Council, are declared "null and void; *and no length of possession "shall be hereafter considered to give validity to any such grant, either with regard "to the property in the soil or the rents of it.* "And every person who now possesses, or "may succeed to, the proprietary right in "any estate or dependant talook, or who now "holds, or may hereafter hold, any estate or "dependant talook, in farm of Government, or "of the proprietor, or any other person, and "every officer of Government appointed to "make the collection from any estate or talook "held khas, is authorized and required to "collect the rents from such lands at the "rates of the pergunnah, and to dispossess "the grantee of the proprietary right in the "land, and to re-annex it to the estate or talook in which it may be situated, without "making previous application to a Court of "Judicature."

That is how the law stood prior to Act X of 1859. But by Section 28 Act X of 1859, it was enacted that "so much of "Section 10 Regulation XIX of 1793 as "authorises and requires proprietors and "farmers of estate, and dependant talooks, "in cases in which grants for holdingl and "exempt from the payment of revenue have "been made subsequent to the date specified "in the said Section, of their own authority "to collect the rents of such land, and to "dispossess the grantees of the proprietary "right in the land, and to re-annex it to the "estate or talook in which it may be situate, "is repealed; and any proprietor or farmer "who may desire to assess any such land, or "to dispossess any such grantee, shall make "application to the Collector; and such "application shall be dealt with as a suit "under the provisions of this Act."

A case was referred to a Full Bench, to consider whether the effect of Section 28 was to deprive the party of the right, which he had under Section 10 Regulation XIX of 1793, of proceeding in the ordinary Courts of Civil Justice. The Court held in that case that, although the party had a right to proceed under Section 28 Act X of 1859, it did not deprive him of the right, which he previously had, of enforcing it in the regular Courts of Justice, notwithstanding the words—"and any proprietor or farmer who "may desire to assess any such land, or to "dispossess any such grantee, shall make "application to the Collector, &c." This Court, without expressing any opinion as to the correctness of that decision, hold that they are bound by it; and that it was authoritatively settled that a party has a right to proceed in the ordinary Civil Courts to enforce his rights under Section 10, as if Section 28 had never been passed.

But the question still remains to be decided—whether proceedings instituted before the 31st December 1861 (that is to say, before the last law of limitation came into operation), in the ordinary Courts of Justice, to enforce a right under Section 10 Regulation XIX of 1793, are barred by limitation, if the invalid lakheraj be proved to have been made since the 1st December 1790. There was a course of decisions in the late Sudder Court that the words "no "length of possession shall be hereafter con- "sidered to give validity to any such grant, "either with regard to the property in the "soil, or the rents of it," excluded limitation when a suit was brought to get rid of a grant subsequent to the 1st December 1790. As a Full Bench has decided that an action still lies in the ordinary Courts to enforce right sunder Section 10, it must be considered whether the law, as laid down in those decisions, has been altered by the provisions of Section 28 Act X of 1859. The latter part of Section 28 is referred to. It enacts that "every such suit shall be instituted "within the period of twelve years from the "time when the title of the person claiming "the right to assess the land or dispossess "the grantee, or of some person claiming "under him, first accrued. If such period "has already elapsed, or will elapse within "two years from the date of the passing of "this Act, such suit may be brought at any "time within two years from such date." The Court are of opinion that those words apply only to new suits brought under Section 28, and that they do not alter the limitation with regard to a suit instituted in the ordinary Courts of Civil Justice. The effect of Section 28, as construed by the decision of the Full Bench, merely takes away the right of proprietors to act of their own authority, and compels them, in the place of so acting, to make application to the Collector. The old right of suit in the Civil Courts still remains; and there is nothing in Section 28 to repeal or alter that part of Section 10 Regulation XIX of 1793 which declares "that no length of possession shall be "hereafter considered to give validity to "any such grant, either with regard to the "property in the soil or the rents of it."

Section 10, however, applies only to grants made since the 1st December 1790; and it must, therefore, be decided on whom the *onus probandi* lies,—whether it is upon the plaintiff to prove that the case is one falling within Section 10, or, in other words, that the grant was made since the 1st December 1790, or upon the defendant to show that he holds under a valid grant. Both of the Lower Courts held that the *onus* was upon the defendant. If the Courts below are right, then the defendant not having given any evidence in the case, the appeal must be decided against him. If, on the other hand, the Court is satisfied that the *onus* is on the plaintiff, to prove that the grant was subsequent to the 1st December 1790, the case must be remanded, in order that the plaintiff may adduce evidence.

We are of opinion that the plaintiff must prove that the case is one falling within Section 10 of Regulation XIX of 1793

so as to show that it is excluded from the law of limitation by the words to which we have referred, "and no length of possession shall be hereafter considered to give "validity to any such grant, &c." He must prove his allegation that the land held by the defendant, and which he claims to be lakheraj, is part of the mâl land of the plaintiff. If he prove that fact and show that it was assessed to the public revenue at the time of the Decennial Settlement, it may be presumed that the right under which the defendant claims to hold as lakheraj commenced subsequently to the 1st December 1790, unless the defendant gives satisfactory evidence to the contrary. We think that the Lower Courts were wrong in holding that the *onus* was upon the defendant.

The case must, therefore, be remanded to the first Court, to be re-tried, with reference to the opinion above expressed. If the plaintiff fail to give the necessary proofs, the third issue as to limitation must be found for the defendant, and judgment must be given for him.

The 22nd February 1865.

Present :

The Hon'ble Sir Barnes Peacock, Kt., *Chief Justice*, and the Hon'ble C. B. Trevor, G. Loch, H. V. Bayley, J. P. Norman, W. Morgan, and G. Campbell, *Judges*.

Lakheraj (created before 1st December —Limitation.

Cases Nos. 1290 and 1291 of 1864.

Special Appeals from decisions passed by the Principal Sudder Ameen of East Burdwan, dated respectively the 10th and 18th February 1864, affirming decisions of the Moonsiff of Chowkey Kunta, dated respectively the 13th and 25th April 1863.

Heera Monee Dabee (Plaintiff), *Appellant*,

versus

Koonj Beharee Holdar and another (Defendants), *Respondents*.

Mr. R. T. Allan and *Baboos Gopeenath Mookerjee, Nobokissen Mookerjee*, and *Obhoy Churn Bose* for Appellant.

Baboos Kalley Mohun Doss and *Mohendrolall Seal* for Respondent.

A suit brought under Section 30 Regulation II of 1819 must be assumed to relate only to lakheraj created prior to 1st December 1790, and is therefore not exempt from limitation under Section 10 Regulation XIX of 1793.

The plaintiff was allowed to amend his plaint complying with the provisions of Section 2 Act VIII of 1859 by stating when his cause of action accrued; for if it accrued beyond the period ordinarily allowed and commencing such suit, by stating the ground on which he claimed exemption.

It has been decided in the case, special appeal No. 869 of 1864, that Section 30 Regulation II of 1819 related only to suits for resumption of lakheraj created prior to the 1st December 1790.

That case was decided by a Full Bench, and we are, therefore, bound by it.

That being so, a suit alleged to be brought under Section 30 must be assumed to refer only to a lakheraj created prior to the 1st of December 1790, and is necessarily not one to which the rule created by Section 10 Regulation XIX of 1793, of exemption from limitation, applies.

If the plaintiff has erred in stating that the suit is brought under Section 30, and wishes to amend his plaint, we think that, under the peculiar circumstances, it would be reasonable to allow him to do so, by striking out the allegation that the suit is brought under Section 30, and to send the case back to the Lower Court for that purpose, with a direction to the Court to proceed with the suit, after the amendment has been made, in the same manner, as if the plaint had originally been presented in its amended form.

If, however, the plaintiff amend his plaint, he must comply with the provisions of Clause 3 Section 26 Act VIII of 1859 by stating when his cause of action accrued, and if the cause of action accrued beyond the period ordinarily allowed by any law for commencing such a suit, by stating the ground upon which exemption from the law is claimed.

The 22nd February 1865.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges*.

Mahomedan Law—Divorce—Husband's statement—Evidence.

Case No. 1402 of 1864.

Special Appeal from a decision passed by Baboo Huro Gowree Bose, Principal Sudder Ameen of Chittagong, dated the 8th March 1864, modifying a decision

passed by Baboo Jugo Chunder Roy Canoongoe, dated the 14th January 1864.

Buksh Ali and others (Defendants), *Appellants,*

versus

Ameerun Bibee (Plaintiff), *Respondent.*

Moulvie Aftabooddeen Mahomed for Appellants.

Baboo Motee Lall Mookerjee for Respondent.

The Mahomedan Law does not provide for the nature of the evidence required to prove a divorce.

Quære.—Whether the husband's statement that he has divorced his wife, is sufficient proof of the fact.

THIS was a suit for maintenance preferred by the special respondent against her husband. His defence was that he had divorced his wife, and was not therefore liable.

The Principal Sudder Ameen held that the divorce was not proved, and allowed the maintenance prayed for.

It is urged specially, that as, by Mahomedan Law, a husband is allowed to divorce his wife for any cause, his (the husband's) statement that he has done so is sufficient proof of the fact, and renders corroborative evidence unnecessary.

We do not find any thing in the books of Mahomedan Law to show the nature of the evidence required to prove a divorce; but the special appellant produced witnesses to prove the fact, which evidence the Principal Sudder Ameen has altogether distrusted, and has held the divorce to be false. This is a finding on fact, with which we cannot interfere in special appeal; and the special respondent must, therefore, have a decree for the amount given her by the Lower Court, as the time for which maintenance was claimed was anterior to the special appellant's statement in Court that he had divorced her.

What future effect that statement may have according to Mahomedan Law, in respect of the special respondent's divorce, is not before us in the present suit, and need not be considered.

The special appeal is dismissed with costs.

The 22nd February 1865.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Suit for possession—Plea of Pottah (traversed by plaintiff)—Onus probandi.

Case No. 1878 of 1864.

Special Appeal from a decision passed by Mr. L. W. Hutchinson, Additional Principal Sudder Ameen of East Burdwan, dated the 21st March 1864, *affirming a decision passed by Baboo Kedarnath Banerjee, Additional Moonsiff of that District, dated the 15th August* 1862.

Joy Ram Chuckerbutty and others (Plaintiff's), *Appellants,*

versus

Bissonath Jash and others (Defendants), *Respondents.*

Baboos Debendro Narain Bose and *Luckhee Churn Bose* for Appellants.

Baboo Anund Gopal Paleet for Respondents.

In a suit for possession where the defendant admits the plaintiff's title but relies on a pottah from the plaintiff's ancestors, and the plaintiff traverses the pottah, the onus is on the defendants to prove the pottah.

THIS was a suit for possession of a tank from which the plaintiff alleged that he had been ousted by the defendants.

The defendants, while admitting the plaintiff's proprietary title, set up a pottah from his ancestors.

The Courts below have thrown the onus wholly on the plaintiff; and because he cannot produce his title deed (which, we may observe, he avers, are in the power of his co-sharers), dismissed the plaintiff's claim.

We think the onus has been thrown on the wrong party. The plaintiff traversed the pottah; and its authenticity and validity have not been enquired into. The defendant admits title of plaintiff, but raises a special plea of grant from his ancestors; the onus is, therefore, most clearly upon him.

The case must be remanded in order that the suit may be tried with reference to these remarks.

The 23rd February 1865.

Present:

The Hon'ble H. V. Bayley and G. Campbell, *Judges.*

Lease—Agent—Notice of renewal.

Case No. 2627 of 1864.

Special Appeal from a decision passed by Mr. A. Pigou, Judge of Hooghly, dated the 4th August 1864, *reversing a decision passed by Baboo Jadub Chunder*

Dey, Moonsiff of that District, dated the 10th February 1864.

Mrs. E. Barnet (Plaintiff), *Appellant*,

versus

Mr. C. B. Skinner and others (Defendants), *Respondents.*

Mr. G. C. Paul and *Baboo Dwarkanath Mitter* for Appellant.

Messrs. R. V. Doyne and *Mirfield* for Respondents.

An agent authorized by a lessor to receive payment of rent, is not necessarily also the lessor's agent for the purpose of receiving notice of the lessee's option to renew, where the lease requires the notice of renewal to be given to the lessor at his usual place of residence. A notice received by the agent, and proved to have been given by him to the lessor within the appointed time (one month before the expiration of the lease), is a sufficient notice to the lessor.

PLAINTIFF is the owner of certain ground and defendants held under a lease for 7 years renewable on giving notice to the plaintiff, at her usual place of residence in writing, one month before the expiration of the lease. Plaintiff gave an order to pay the rent to Messrs. Colvin, Cowie and Co., but nothing more. The lease expired on 30th April 1863. On 25th March of that year, defendants gave notice of their wish to renew to Messrs. Colvin, Cowie and Co., who seem to have accepted the notice and entered into a correspondence on the subject. On the 10th April, Messrs. Colvin, Cowie and Co. wrote to plaintiff—"you are probably aware that Jardine, Skinner and Co. have the option of renewal of the lease. They wish to take advantage of it, &c. &c."

Plaintiff now says that she had no notice of renewal in the terms of the covenant, and claims to re-enter. Defendants say that they gave notice to Colvin, Cowie and Co., and that Colvin, Cowie and Co. informed the plaintiff. The first Court decided for plaintiff. The Lower Appellate Court considered that there was no express denial of the assertion that plaintiff had received notice from Messrs. Colvin, Cowie and Co., and that fact must be taken as admitted, and reversed the decision.

Mr. Paul appears in support of the special appellant. Messrs. Doyne and Mirfield, retained for the defence, do not appeal.

We think that Messrs. Colvin, Cowie and Co. are not shewn to be in any way plaintiff's agents for more than receipt of rents, and that a notice to them was not sufficient. If, however, Colvin, Cowie and Co., gave the notice to the plaintiff within time, that would, we think, render the notice sufficient. But we cannot consider this fact to be in any way admitted. In our view, the case turns upon it; and we remand the case to the first Court to give the defendants an opportunity of proving, if they can, that notice reached the plaintiff before 1st April 1863, and decide the case accordingly. The case to be taken up out of its turn, and re-tried with reference to the above remarks.

The 23rd February 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Compromise (Breach of)—Enforcement—Renewal of originial claim.

Case No. 317 of 1864.

Regular Appeal from a decision passed by Baboo Gopeenath Bose, Principal Sudder Ameen of Nuddea, dated the 31st May 1864.

Bishnu Coomar Roy (Plaintiff), *Appellant*,

versus

Moharaj Joy Hurish Chunder Deb Roy and others (Defendants), *Respondents.*

Baboos Mohendro Lall Shome and *Bungshee Budden Mitter* for Appellant.

Baboo Banee Maddub Banerjee for Respondents.

Suit laid at Rupees 7,749.

A compromise must be treated as a new and positive contract. A breach of its stipulations may be ground for a suit for its enforcement, but not for a revival of the original cl aim.

THE appeal in this case is brought by the unsuccessful plaintiff, solely on the ground that, the defendant not having kept the terms of a certain compromise entered into by him with the plaintiff, the latter is now at liberty to fall back on his original rights, and to have them decreed by the Court.

It seems that the plaintiff had a claim against the Rajah of Kishnagur for maintenance, and that some litigation ensued between these parties under Act XX of 1841. While an appeal was pending in the late Sudder Court, an adjustment of the dispute was made by rufaanamah and suffeenamah, the terms of which were that the plaintiff, Bishnu Coomar, should, from the year 1268, either receive the um of 200 Rupees interest on certain Government paper, or that he should have made over to him the amount of 5,000 Rupees in such paper of which he

and his heirs would enjoy the interest, the said paper being transferred to his name.

The plaintiff now sues, alleging that the defendant has violated these conditions, though he does not precisely state by what acts or omissions, or in what particulars.

The Lower Court has treated the case as a breach of contract on the compromise, holding that the defendant has failed to prove an alleged payment of 375 Rupees, and the Court has declared the plaintiff entitled to receive 5,000 rupees in Government paper with interest thereon of 600 Rupees, but the Court has not allowed the plaintiff to revive, or fall back upon, his former claim.

We hold that the Lower Court has decided quite correctly. A case quoted against his view (S. D. A. Rep. 18th April 1850) is not analogous; while the case tried by Justices Morgan and Shumboonath Pundit, and reported in the Weekly Reporter of the 5th of December 1864, page 265, entirely endorses the Lower Court's ruling.

The compromise entered into must be treated as a new and positive contract, by which the defendant bound himself to by one of two things, *viz.*, either to pay the yearly interest of 200 Rupees, or to make over the amount of 5,000 Rupees in Government paper.

On failure of either, or of both alternatives, there is no doubt that the defendant can be and has been rightly sued, and that the plaintiff has obtained that to which he is entitled.

His pretension to revive his old claim, on breach of the stipulations in the compromise, is quite untenable.

Appeal dismissed with costs.

The 23rd February 1865.

Present:

The Hon'ble G. Loch, H. V. Bayley and E. Jackson, *Judges.*

Suit for possession—Evidence—Survey maps.

Case No. 3384 of 1863.

Special Appeals from a decision passed by Mr. C. S. Belli, Judge of Rajshahye, dated the 21st August 1863, reversing a decision passed by Baboo Anund Chunder Banerjee, Judge of the Small Cause Court, exercising the powers of a Principal Sudder Ameen of that District, dated the 19th March 1863.

The Collector of Rajshahye, on behalf of Promothonath Roy, minor, (Defendant), *Appellant,*

versus

Doorga Soonduree Debia (Plaintiff), *Respondent.*

Baboo Kishen Kishore Ghose for Appellant.

Baboo Hem Chunder Banerjee for Respondent.

Case No. 3386 of 1863.

The Collector of Rajshahye on behalf of Promothonath Roy, minor, (Defendant), *Appellant,*

versus

Hem Chunder Sircar (Plaintiff), *Respondent.*

Baboo Kishen Kishore Ghose for Appellant.

Baboo Onoocool Chunder Mookerjee for Respondent.

A survey map is not sufficient, in the absence of other satisfactory proof of title, or of long antecedent possession, to establish a plaintiff's right to the land, and to disturb the defendant's present possession.

Mr. Justice Bayley.—In these two special appeals, the contention is as follows:—

Plaintiff sued for some lands as of her village of Bamunkata. Defendant avers that those lands are of his village of Nischinda. Plaintiff avers that the land has been, in the survey, demarcated as of his village of Bamunkata. Defendant does not deny this. Both parties admit, and it is found as a fact by the Court below, that the land till within the last 6 or 7 years was jungle waste. Further, both parties admit that in a case under Act IV of 1840, the award was in favor of defendant.

The first Court decided that under the award of a competent Court (*i. e.*, the Act IV award), the onus to prove title was on plaintiff, and that the survey map which he produced was not sufficient proof *per se* of title. The first Court, therefore, dismissed plaintiff's suit.

The Lower Appellate Court reversed this order, holding that, as the agents of both parties had assented to the survey demarcation, it gave plaintiff a title; or to use the Judge's own words—"As then it is "perfectly clear that the land was given "by the Survey Officers to the plaintiff's "village Bamunkata, the land presumably "belongs to them; and I think it would "require a very strong case indeed to justify "the Civil Court in interfering with a bound-"ary which they had authority by law to "lay down, and which they, in conformity

"with such legal authority, did lay down "after due notice and without dispute." The Lower Appellate Court also noticed that, at the period of survey, the land in dispute "was almost entirely jungle." It proceeds to say that thus the land nominally in possession of plaintiff by the authority of the survey proceedings was waste and unnoticed, which would account for plaintiff having no documentary proofs of possession. The Lower Appellate Court then ruled that it was not necessary under this state of facts for plaintiff to prove dispossession, and that no dispute arose till the land became worth cultivating (this both parties admit was 6 or 7 years ago). The Judge accordingly decreed plaintiff's claim; and defendant (the Collector for the Court of Wards) appeals specially. urging—

I. That limitation under Section 14 Regulation III of 1793 bars this suit.

II. Defendant being in possession under the award of a competent Court (the Act IV award), it was for plaintiff to prove his title and dispossession.

III. That the survey map was not sufficient proof of title.

On the first plea, I think, that no adverse possession of such jungle land as this, is shewn on either side ,and that no actual real possession such as would properly admit of the application of the law of limitation rose *on defendant's* part till the award under Act IV of 1840, *i. e.*, admittedly within 12 years. I, therefore, would over-rule this objection.

The second and third pleas, I consider valid. A map of demarcation, though signed by agents, is not an award of a competent Court. An award of a survey authority can only be that which is decided by such authority after a real contest between the parties and an adjudication. Now, here, on the other side, we have an award under a competent Court, *i. e.*, the Criminal Court under Act IV of 1840; and before the possession of defendant under that can be set aside, the plaintiff must show a similar award of a competent Court, or a superior title. Here, plaintiff's title rests on the survey map of *demarcation*, and on no award legally so called. This alone is not, according to the practice and precedents of this Court, such proof of title as would *per se* (and it stands alone) justify a decree, setting aside defendant's possession.

Accordingly, I would decree this special appeal on the second and third pleas noted abvoe with costs.

Mr. Justice Jackson.—I agree with my colleague that the plaintiff's claim is not barred by limitation.

But I entertain some doubts of the correctness of the law, which he would lay down to the effect that Survey maps are not sufficient evidence of a plaintiff's title to land. The land in dispute in this case is described as a large block of 750 beegahs situated between the plaintiff's estate Bamunkata, and the defendant's estate Nischinda. The Government survey maps of the two villages were produced in evidence at the trial of the suit. That of Nischinda, signed by the defendant's agents, did not include the land in that estate, whereas that of Bamunkata did include it. Act II of 1855 rules that maps made under the authority of Government, and not made for the purpose of any litigated questions, shall *primâ facie* be deemed correct, and shall be admitted in evidence without further proof. But the Judge relies on these maps as evidence of plaintiff's title, not so much on this law, as on the general principles applicable to this particular description of evidence. He holds that the maps of the two villages contain an admission by the defendant that the land does not belong to his village, and an assertion by the plaintiff that the right and ownership of land was with him.

I think these maps would be important evidence, even if they were private maps; but, as public survey maps prepared by independent Government Officers publicly appointed to this special duty, prepared also after public proclamation to all parties interested to appear and protect their interests, their importance is very much increased. It is admitted that the estates of the plaintiff and defendand lie contiguous, and that they adjoin one another. The admission of the defendant's agent in the preparation of the map of the defendant's village, that the land did not appertain to his village, was, therefore, an admission that the land did belong to his neighbour the plaintiff's village. It is found that this admission was made at a time when there was no dispute regarding the land. It is, therefore, an admission made against interest before there was any dispute, and is so much more valuable on that account. The defendant is a Rajah with large estates. Had the map been signed by himself, it would have been conclusive evidence against him. The admission, by his agent and by the villagers generally at a time when there was no dispute, is, I think, at least very important evidence

of plaintiff's title to the land. Similarly, the map of the plaintiff's village shews that, at the time of the survey, the plaintiff alone laid claim to the land, and that no one disputed his claim. Such a public assertion of a right of ownership is also, I think, important evidence of his title. In the absence of direct title-deeds, acts of ownership are the best proofs of title—"Acts of ownership when submitted to, are analogous to admissions or declarations by the party submitting to them that the party exercising them has a right to do so, and that he is, therefore, the owner of the property upon which they are exercised." (*See* Starkie's Evidence, page 470 note F).

I would, therefore, confirm the Judge's decision that these maps are evidence of the plaintiff's title, which the defendant is bound to rebut, and dismiss this appeal with costs.

Mr. Justice Loch.—In 1850, the revenue survey of the villages, of one or other of which the lands now in dispute form a part, was made by the Deputy Collector. The boundary line between the villages was laid down in the presence of the agents of both parties, and the map drawn up accordingly. The land was then jungle, and apparently was considered of little or no value. It is alleged that the defendant has overstepped that boundary line and taken possession of the plaintiff's lands; and defendant's possession has been confirmed by an award under Act IV of 1840.

Now, it is clear that the Government survey does not look to title but to possession only. The boundary is laid down according to possession; and a party may, without any injury to his title, admit the possession of another to lands to which he may consider himself to have a preferential claim. Such admission cannot affect his title. After such survey, possession might pass, as in the present instance, from one party to the other. Encroachments made over an ill-defined or imaginary boundary line passing through jungle might easily, and almost imperceptibly, be made without attracting observation and without opposition, and no claim would probably be made to recover possession till cultivation had rendered the lands more valuable. Cultivation would, be the signal for litigation, and the dispute would, under the former course of procedure, be usually tried, as in the present instance, in the Criminal Court, and settled under Act IV of 1840. By that law, the party in whose favor the award is given, is to be kept in possession till the *right* to possession be determined by a competent Court.

In the present instance, the award under Act IV of 1840, passed on 21st September 1861, or about eleven years after the survey declared the defendant to be in possession. and entitled to retain it till plaintiff proved a better title. Plaintiff has no title to show, but that of possession as admitted by defendant at the time of the survey. But possession, as remarked above, might have been admitted without affecting the defendant's right, and possession, unless for a very long period, will not give a title. I concur, therefore, with Mr. Justice Bayley in thinking that the survey map, on which the plaintiff relies, is not sufficient, in the absence of other satisfactory proof of title, or of long antecedent possession, to establish plaintiff's right to the land and to disturb the defendant's present possession. I decree the appeal with costs.

The 24th February 1865.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges*.

Easement—User—Special Appeal.

No. 815 of 1864.

Application for review of judgment passed by the Hon'ble F. B. Kemp and F. A. Glover, on 28th November 1864, *in Special Appeal No.* 805 *of* 1864.

Moonshee Zumeer Ali (laintiff), *Appellant*,

versus

Musst. Durgahim (Defendant), *Respondent*.

Mr. R. V. Dyone for Appellant.

Mr. C. Gregory and *Moonshee Ameer Ali* for Respondent.

A finding by the Lower Appellate Court that the special appellant had failed to prove his *user* as of right an easement on the special respondent's land, cannot be interfered with in special appeal.

Mr. Justice Glover.—THE circumstances of this case have been fully detailed in our former judgment, dated the 28th of November last.

And in considering this application for a review of that judgment, it must not be forgotten that the case was a special appeal; and that the Judge of the Lower Court had found, as a fact, that the recorded evidence, in support of the claim to the easement, was not to be relied on.

So that the point for consideration in this review is narrowed to this, *viz.*, whether, under the circumstances, the petitioner has not made out his claim to the benefit of the presumption, notwithstanding the failure of the direct evidence of "*user*," in respect of keeping the smaller "*bund*" in repair.

Now, it is admitted that the 160 *bâns* (bamboo lengths) of the bund are on the petitioner's land, and 10 *bâns* only on the respondent's property; it is not denied that the petitioner has cultivated a large quantity (1,000 beegahs more or less) of land for many years, and that this cultivation is mainly, if not altogether, due to the bunds in question.

It may be taken as proved—for the point is so considered by the Judge—that all or the greater part of the benefit derivable from the bund of 160 *bâns*, would be nullifieid if the 10 *bâns*, were demolished; and as it is quite clear that the longer bund has existed for very many years, at the first blush the presumption would seem naturally to arise that the petitioner must have had some grant of the remaining 10 *bâns*; that he had the right of "*user*" over them, otherwise he would not have built the 160 *bâns* of bund in his own land, they being useless without the supplementary 10 *bâns* on the respondent's land.

I was at first inclined to take this view on the ground that whilst it was not denied that the petitioner had cultivated a large quantity of land for many years, which cultivation he could not have carried on without the aid of the smaller bund, there was no proof that the respondent had ever before complained or had resisted the petitioner's "*user*;" but on further consideration, and bearing in mind that the petitioner's claim to the easement, if admitted, must, to a certain extent, damage the respondent's cultivation (a fact which militates against the persumption of uninterruped "*user*" on the part of the petitioner), and bearing also in mind that the Judge below has found, as a fact that the respondent, in cutting the bund, is "only justly exercising her own right," I do not think that, in the absence of an express grant, we should be justified (on special appeal) in giving petitioner the "easement" he claims.

In cases, where no express grant exists, the right to an easement must be limited by the amount of enjoyment proved to have been had; and as the Judge has found, as a fact, that the respondent is and has been in the habit of cutting the bund at certain seasons, and carrying off the surplus water by a "*Pyne*" to the river, it follows that the petitioner's enjoyment has been of a temporary nature only, liable to interruption at the will of the owner of the smaller bund.

I do not express any opinion as to the sufficiency or otherwise of the evidence, on which the Lower Court has found in favor of the respondent; but take its decision as one of fact, which, on special appeal, the law gives this Court no power to question.

Taking this view of the case, I would uphold our former judgment and dismiss this application with costs.

Mr. Justice Kemp.—The Judge having found upon the evidence that the special appellant had not proved his *user* as of right of an easement on the special respondent's land, we cannot interfere in special appeal, nor are we warranted in inferring a *user* in the absence of evidence of the special appellant's enjoyment of the same.

I concur in rejecting this application for a review of our former judgment.

The 27th February 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Survey Award (when not an award of a competent authority under Section 14 Act VIII of 1859).

Case No. 389 of 1864.

Reguar Appeal from a decision passed by the Judge of Jessore, dated the 1st July 1864.

Anund Chunder Mitter and others (Plaintiffs), *Appellants,*

versus

Doorga Doss Roy and others (Defendants) *Respondents.*

Baboos Dwarkanath Mitter and *Gopal Lal Mitter* for Appellants.

None for Respondents.

Suit laid at Rupees 2,164-8 annas 10 gundahs.

When a Survey Award is contested by a plaintiff within the proper time, and the accuracy or otherwise of the same is the very question to be tried, it cannot be held to be the award of a "competent authority" within the meaning of Section 14 Act VIII of 1859.

THE only point that arises on this appeal is whether the Judge is correct in ruling under Section 14 of Act VIII, that

the Survey Authorities are the competent authorities contemplated by that Section.

The plaintiff sues for a share of Bheel Jangalia, alleging the same to be his right, and to be included within the district of Jessore, and stating that the Survey Authorities have wrongly included the same within the limits of the district of Backergunge.

The Judge, in effect, says to him—"you "must sue in the Civil Court of Backer- "gunge, and not in that of Jessore, because "the land in dispute had been adjudged "by a competent authority to belong to an "estate within the jurisdiction of that other "Court."

A decision of the High Court of the 8th of May 1863, page 581 of Hay's Reports, does certainly rule that the Survey Authorities are "competent authorities" within the meaning and object of the Section quoted. But the facts of that case are not given; and it is now argued that, though a Survey Award, which had clearly defined the boundary of two districts, would, no doubt, be the award of a competent authority in case of disputes arising from other sources, or in after years, relative to the limits of either districts, yet this cannot hold good where a suit is brought within the legal period, to set aside the very award of the survey, and in which the demarcation of the said survey is the very act and deed complained of.

The plaintiff, as his pleader contends, cannot surely go to the Civil Court at Backergunge to give him lands, which, by the nature and essence of his suit, ought to be and must be in Jessore, while, if the Court at Backergunge did take cognizance of and decree the claim, how could execution be enforced and possession be given?

It seems to us that these arguments are correct and sound, and that a Survey Award being contested by a plaintiff within the proper time, and the accuracy or incorrectness of the same being the very thing to be tried, it cannot be held to be the award of a "competent authority." The Lower Court should have treated the case under the first portion of the Section in question, and should have tried whether the land were within its local jurisdiction or not.

In such a case, the trial of such a point would involve the real merits of the dispute between the parties, and the whole question of right and title.

In this view of the case, we set aside the ruling of the Judge, and remand the case to him to be tried fully and fairly on its merits. He will restore the case to its number on the register under Section 351.

The 27th February 1865.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Bills of Exchange—Non-Liability of Drawers—Want of notice of dishonor.

Case No. 1983 of 1864.

Special Appeal from a decision passed by the Judge of Behar, dated the 28th April 1864, *affirming a decision passed by the Principal Sudder Ameen of that District, dated the 15th September* 1863.

Jeetun Loll and others (Defendants), *Appellants,*

versus

Sheo Churn (Plaintiff), *Respondent.*

Messrs. R. T. Allan, and *R. E. Twidale* for Appellants.

Baboo Kishen Succa Mookerjee for Respondent.

The omission by the holder to give notice of dishonor discharges the drawer of a Hoondee from liability.

THIS was a suit to recover the value of a Hoondee drawn by the defendants (special appellants) Jeetun Loll and Sheo Kallee, on the *kotee* of Nowbut Roy and Co., of Calcutta. The bill was drawn in favor of Gunesh Loll, from whom it passed to Sheo Churn Loll the plaintiff.

On presentation to the mahajuns, the drawees in Calcutta, the hoondee was dishonored, and the last endorsee sued the payee and the drawer for the amount due on it.

The payee, Gunesh Loll, disclaimed liability on the ground that he had purchased the bill from the drawer; whilst Jeetun Loll, though admitting having granted the hoondee, declared that he had received no consideration for it from Gunesh Loll.

Both Lower Courts held that this defence was not proved, and gave a decree against Gunesh Loll, first, with power to the endorsee to execute it also against the drawers Jeetun Loll and Sheo Kallee, should the payee not liquidate the amount.

Against this decree, Jeetun Loll and his partner appeal specially, urging (1) that the Hoondee, not having been accepted by the drawee, was not a negotiable instrument, and that (2) in any case, they, the drawers, were not liable, as they had no notice of the dishonor.

The first objection is clearly untenable. A bill of exchange is not the less valid, because it has not been accepted by the drawee. It depends on the will and pleasure of the payee to carry it to the drawee for acceptance; and although, in the majority of cases, it would probably be so presented, neglect to present, except under peculiar circumstances which do not arise in this case, cannot, of course, affect the drawer's liability, should the bill be eventually dishonored.

The second must, we think, be allowed. There is no contention in this case that notice of dishonor was given; it is admitted that no such notice reached the drawer. Now, according to English Law, notice would be "indispensable in order to charge either the drawer or the endorsers with the payment of the bill; and if any party, who is entitled to notice of the non-payment, has not due notice thereof given or sent to him, he will be discharged from all liability to pay the bill." (*Vide* Story on Bills, page 485).

It is urged vaguely by the other side, that the mahajunee customs do not contemplate notice of dishonor, and that non-service of notice cannot protect a drawer. There is, we observe, no proof on the record of this allegation, nor would it appear that any such custom exists. On the contrary, in the only precedent we can find bearing on such cases (S. D. A. Rep., volume III, page 178, Ishree Pershad and another) it is clearly stated, on an examination of a number of Calcutta mahajuns as to the custom of their trade, that "they (the mahajuns) could not say how far the omission on the part of the holder to give immediate notice to the drawer of the non-payment would except the drawer from responsibility, because it was the *invariable practice* to give immediate notice, and that they had never heard of an instance where this practice was departed from?"

It was further held by this Court on the 6th September 1864 (Sutherland's Weekly Reporter, page 75) that, though the strict English Law regarding bills of exchange was not applicable to transactions in which one of the parties was a native of India, still the holder of a bill to be entitled to sue the maker must give him notice of dishonor, or non-payment within such reasonable time as will enable him to protect himself.

But it is urged by the special respondent that the drawers of the hoondee, never having sent advice to their Calcutta correspondents, were perfectly aware that payment would be refused, and that no notice of dishonor was, therefore, necessary. On this we observe that the bill in question is a simple order to pay. We have read it in the original, and there is no stipulation in it that it is only to be paid on advice received. By its terms it would be payable with or without advice.

We think, therefore, that the want of notice of dishonor is fatal to this action as against the drawers Jeetun Loll and Sheo-Kalee, and that the decree of the Lower Appellate Court must be reversed so far with costs on the special respondent.

As Gunesh Loll has not appealed, he will not be entitled to the benefit of this order. As against him, the decree of the Lower Court will stand.

The 27th February 1865.

Present:

The Hon'ble C. B. Trevor, H. V. Bayley, J. P. Norman, W. Morgan, and F. B. Kemp, *Judges.*

Pre-emption—Conditional sale or mortgage.

Case No. 1727 of 1864.

Special Appeal from a decision passed by Mr. H. Richardson, Additional Judge of Bhaugulpore, dated the 21st May 1864, reversing a decision passed by Baboo Huro Chunder Chatterjee, Principal Sudder Ameen of that District, dated the 31st July 1861.

Goordyal Mundur and other (Plaintiffs), *Appellants,*

versus

Rajah Teknarain Singh and others (Defendants), *Respondents.*

Messrs. R. V. Doyne and *J Baptist* and *Moonshee Ameer Ali* for Appellants.

Messrs. R. T. Allan and *C. Gregory* for Respondents.

No right of pre-emption, arises on a mere conditional sale or mortgage while any right of redemption remains in the mortgagor.

A mere declaration of an intention to exercise a right not yet accrued, is not a claim of a right of pre-emption. It is immaterial whether a formal demand of pre-emption is made at any other time than after the sale became absolute. (*Dissentiente* Bayley, J.)

THIS case was submitted to us under the following circumstances:—

The plaintiff, a shareholder in mouzah Marho, sued to establish a right of pre-emp-

tion in respect of 3 annas 4 gundahs of that mouzah mortgaged by his co-sharer, Sankosh Singh, to Rajah Tek Narain, the defendant, by a deed purporting on the face of it to be an absolute sale. The plaintiff alleged that he claimed a right of pre-emption, and that he went through the forms to entitle him to it, when the conditional sale was made, and also subsequently, when the mortgage was foreclosed. The Lower Appellate Court found that it was not proved that any demand was made at the expiration of the year of grace. The plaintiff, in special appeal, alleged that he had made a formal demand at the time of the execution of the deed; and that the Judge should have enquired into this, and was wrong in holding that it would not be sufficient to entitle him to a right of pre-emption, if proved.

Mr. Justice Bayley thought that, taking the deed to be one of conditional sale under Mahomedan Law as found by the Court below, the formal demand necessary to secure the right of pre-emption could be made at the time of its execution. Mr. Justice Macpherson being of a contrary opinion, the point was referred to a Full Bench.

We think it is clear that, in cases of mortgages which are foreclosed, the right to pre-emption does not arise until the sale becomes absolute. This is evident from the very definition given by Macnaghten of the right of pre-emption, *viz.*, that it is a power of possessing property which has been sold by paying a sum equal to that paid by the purchaser. *See* also Hamilton's Hedaya, volume III, page 568; Macnaghten's Precedents, page 196; and a case decided in this Court by Trevor and Campbell, J. J., 18th June 1864. It has never been contended that a right of pre-emption includes a right of paying off a mortgage, and of standing in the position of the mortgagee.

It appears from Baillie's Mahomedan Law of Sale, page 303, Edition of 1850 that, notwithstanding a mortgage by way of conditional sale to a co-sharer, the mortgagor in right of his equity of redemption retains his right of pre-emption in respect of other land sold by that co-sharer to a stranger. This shews that a mortgage does not in any way affect the right of pre-emption. For this purpose, the mortgagor still remains, in contemplation of law, the owner of the mortgaged property. The right of pre-emption does not arise until the seller's right of property has been completely extinguished, and, therefore, has been said not to exist if the seller has secured to himself any condition of option or power of dissolving the sale at a future time. So, if he transfers the property by an invalid sale, there is no right of pre-emption, for the property continues his notwithstanding such a sale. *See* Hedaya, volume III, page 596.

We must, therefore, say that no right of pre-emption can arise on a mere conditional sale or mortgage, while any right of redemption remains in the mortgagor.

It has been decided that a refusal to purchase before the sale is complete cannot operate to defeat a claim of right of pre-emption subsequently preferred. *See* Macnaghten's Precedents, page 196. We need not now discuss the question whether this proposition is universally true. But it is certain that the mere declaration of an intention to exercise a right, which has not yet accrued, is in no sense a claim of a right of pre-emption.

On these grounds, we are of opinion, that it was wholly immaterial whether the plaintiff had made any formal demandof pre-emption at any other time than after the sale became absolute.

The appeal will, therefore, be dismissed with costs and interest.

Mr. Justice Bayley.—It is with much diffidence that I still differ from my former colleague in the Division Bench, Mr. Justice Macpherson, and from my four colleagues in the Full Bench. The reasons for my still holding to my opinion, that the case should be remanded for investigation, whether plaintiff did or did not make the necessary formal demand at the time of hearing of the execution of the deed of a sale, are briefly these:—

I. The claim of pre-emption is one under Mahomedan Law; and the provision of that Law requires the claim of pre-emption to be made on hearing of the sale. The plaintiff alleges that, when he heard of the sale, he made his claim of pre-emption. In this case, the original deed had the form of an absolute deed of sale. It was only discovered to have been made conditional by another act, some time afterwards. The Mahomedan Law defines a conditional sale as one of the recognized species of sale. I have before quoted two passages where a conditional sale and an absolute one are declared to be both equally "sales." (Para 4 of the Chapter of Sales in Macnaghten's Mahomedan Law, and pages 302 and 303 of Baillie's Mahomedan Law of Sale.)

Then, if we look to the policy of the Mahomedan Law in regard to pre-emption, it

is clearly this, that co-parceners, those interested in the profits, and neighbours in order enumerated shall have the *earliest* opportunity of knowing of land being available to them in respect to which to assert the claim of pre-emption. (*Vide* Chapter on Pre-emption in Macnaghten's Work, pages 42 and 43).

Again, in this case at the time at which plaintiffs allege they made the claim, the deed in the only form in which it appeared was that of an absolute sale. Can it be said, then, (leaving alone for the present the question whether we are to consider the transaction a mortgage under English or Regulation Law, or an equivalent to a sale under Mahomedan Law, that the pre-emptor transgressed the law in making the claim when he first heard of the execution of the deed as an absolute deed. I hold that he followed the law, and is, therefore, entitled to have its privileges, if it be ascertained on remand (a point not yet enquired into) that he did duly *then* make the necessary formal demands.

I would still, therefore, remand the case for re-trial on this matter.

The 27th February 1865.

Present :

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Majority (under Act XL of 1858.)—Mahomedan Law.

Case No. 359 of 1864.

Regular Appeal from a decision passed by the Judge of Tipperah, dated the 20th February 1864.

Mahomed Arsud Chowdhry (Defendant), *Appellant,*

versus

Oosun Bibee (Plaintiff), *Respondent.*

Mr. R. T. Allan for Appellant.

Baboo Kishen Kishore Ghose and *Moulvie Murhumut Hossein* for Respondent.

Suit laid at Rupees 6,666-10 annas 6 pies.

Where a certificate of guardianship has been granted under Act XL of 1858, it is by the terms of that Act, and not by reference to Mahomedan or Hindoo Law, that the period at which the ward is to be considered of full age is to be determined.

THE appellant in this case is the defendant in the Court below. The respondent, as guardian of her minor daughter, sued the appellant as guardian of his minor son, the object of the suit being to enforce payment of money due under a kabinnamah executed by the appellant on behalf of his minor son, on the occasion of the marriage of the latter to the daughter of the respondent. The execution of the kabinnamah is not denied: but the appellant pleaded that the suit was wrongly brought by the respondent as guardian, inasmuch as the daughter having attained puberty, was of full age according to Mahomedan Law, and could and ought to sue in her own name. He also pleaded that the suit would not lie against him as guardian of his son, inasmuch as the son had attained the age of 18 years before its institution. The Lower Court held that, as the respondent had obtained a certificate as guardian of her daughter under Act XL of 1858, the daughtor having attained puberty did not make her legally of age so long as she had not attained the age of 18—the age of majority prescribed by Section 26 of Act XL of 1858: and it further held that on the evidence it was not proved that the appellant's son had attained his eighteenth year.

The appellant appeals from this decision, repeating before us the various pleas urged by him in the Court of first instance, and also contending that, although a certificate as guardian may legally have been granted to the respondent during the minority of her daughter's husband, still the certificate must (under Section 27 of Act XL of 1858) have ceased to have any effect from the time when the husband attained his majority, and reached his eighteenth year.

We are clearly of opinion that this case must be decided according to the provisions of Act XL of 1858, and that it is wholly immaterial, so far as majority under that Act is concerned, at what age a girl is by Mahomedian Law, considered to be of full age. The question before us is as to the effect of a certificate under Act XL of 1858, and the 26th Section of that Act expressly says that, "for the purposes of this Act, every person "shall be held to be a minor who has not "attained the age of 18 years." No doubt, if the appellant prove that the husband had attained the age of 18 before the institution of this suit, he would be entitled to our judgment, because, on the husband's attaining his majority, the respondent's title as guardian under the certificate would clearly cease (*see* Section 27 of Act XL of 1858): and because also, if his son had become of full age, the appellant could not have been liable to be sued for him as his guardian. But the appellant has not proved that his

son was 18 years old when the suit was instituted. The Lower Court has found that he failed to prove this, and in this finding we concur. We have heard all that has been urged in appellant's favor, and have carefully considered the evidence ; and the conclusion we arrive at is that the Lower Court rightly held that it was not proved that the appellant's son had attained his eighteenth year before the plaint was filed.

The appeal is dismissed with costs.

The 6th March 1865.

Present :

The Hon'ble J. P. Norman and Shumboonath Pundit, *Judges.*

Examination of party—Application for order.

Case No. 2623 of 1864.

Special Appeal from a decision passed by the Officiating Additional Judge of Bhaugulpore, dated the 2nd June 1864, *reversing a decision passed by the Principal Sudder Ameen of that District, dated the 23rd December* 1861.

Allad Singh Roy (Defendant), *Appellant,*

versus

Ram Pershad Singh and others (Plaintiffs), *Respondents.*

Baboos Anund Gopal Paleet and *Kalee Kishen Sein* for Appellant.

Mr. S. Baptist and *Moonshee Ameer Ali* for Respondents.

If A, party to a suit, applies for the examination of another party B, it is A's duty under Section 165. Act VIII of 1859, after the expiration of the time given to B to show cause why he should not attend and give evidence, to apply for an order requiring B to attend and give evidence.

DEFENDANT Allad Singh, special appellant, objects that the plaintiff was not summoned He shows that he made an application to the Judge under Section 162 of Act VIII, for an order requiring the attendance of the plaintiff; that he showed grounds on which, under Section 163, the plaintiff's vakeel was called upon to show cause, on a certain day, why the plaintiff should not attend to give evidence; that on the day named, no cause was shewn. But he fails to show that his vakeel asked for the order to which he was entitled under Section 165. We think it was the business of the defendant to have asked for the order, after the expiration of the time for shewing cause, and that, if he failed to apply for it, it was his own fault.

We think that the matters, gone into in special appeal 2144, show that further investigation is required in this case; and, therefore, this case as well as No. 2602, which is governed by it, must be remanded for trial.

The 10th March 1865.

Present :

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Title (incidental)—Adjudication of.

Case No. 2781 of 1864.

Special Appeal from a decision passed by Mr. W. Ainslie, Judge of Patna, dated the 19th July 1864, *affirming a decision passed by Moonshee Ali Hyder Khan, Sudder Ameen of that District, dated the 30th December* 1863.

Omrao Singh (Defendant), *Appellant,*

versus

Khuruk Sing and others (Plaintiffs), *Respondents.*

Baboos Roopnath Banerjee and *Grish Chunder Ghose* for Appellant.

Baboo Kishen Succa Mookerjee for Respondents.

The title to large properties may be incidentally adjudicated upon in suits for small amounts.

THE appellant's pleader has relied in argument solely on the third ground taken in the memorandum of appeal. He contended that the Lower Court is wrong in giving a decision, which practically is a decision as to the title to a very large estate, in this suit which is for a very trifling matter, and is valued only at 20 rupees. This is no good ground for special appeal. It is evident that the title to large properties must often be incidentally proved and adjudicated upon in causes for small amounts. Titles are so adjudicated upon daily in every Court in the country : and it is no legal objection to the suits in which they are so, that the judgment which the Court gives, may afterwards be made use of as evidence by one party or the other, in proceedings relating to more important questions between them.

The 14th March 1865.

Present :

The Hon'ble H. V. Bayley and G. Campbell, *Judges.*

Joint suit by four different proprietors dispossessed under one Survey award—Certificite (under Act XL of 1858).

Case No. 1239 of 1864.

Special Appeal from a decision passed by Mr. F. J. Cockburn, Officiating Additional Judge of Backergunge, dated the 24th February 1864, affirming a decision passed by the Sudder Ameen of that District, dated the 21st July 1863.

Anund Chunder Ghose and another (Defendants), *Appellants*,

versus

Komul Narain Ghose and others (Plaintiffs and Defendants), *Respondents*.

Mr. R. T. Allan and *Baboo Onoocool Chunder Mookerjee* for Appellants.

Baboo Mohinee Mohun Roy for Respondents.

A village had been divided into four separate portions with four different parties who were afterwards dispossessed under one and the same Survey award which demarcated the village as appertaining to the defendant's estate. HELD that the four parties could sue jointly.

Section 3 Act XL of 1858 gives discretion to the Court to admit a party to sue without a Certificate.

IN this case a certain village was demarcated by the survey authorities with defendant's estate. That village had been divided into four separate portions, each portion being a distinct estate on the Government Rent-Roll. The proprietors of these several estates were distinct parties; but all of them had been dispossessed by the one award of the survey authorities. They joined in a suit to set aside that survey award, and recover possession from defendants.

The Lower Courts gave these plaintiffs a decree. In special appeal it is urged, *firstly*, that the plaintiffs could not sue jointly as each plaintiff was not a proprietor of each of the four estates; *secondly*, that there were some minors in respect to whom the parties suing did not hold certificates under Section 3 Act XL of 1858.

We are of opinion that, as the survey award was one act by which all the plaintiffs were dispossessed and defendant put in possession of the one village which had been divided into four portions, the four sets of proprietors of the village aggrieved by that one act, had a common cause of action, and that it is in accord with Section 8 Act VIII of 1859, and the general policy of the law that they should so sue jointly. On the second plea we observe that Section 3 Act XL of 1858 gives a discretion to the Court to admit parties to sue without certificate.

Rejected with costs.

The 14th March 1865.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges*.

Cultivator—Trespasser.

Case No. 2869 of 1864.

Special Appeal from a decision passed by Moulvie Itrut Hossein, Principal Sudder Ameen of Sarun, dated the 7th July 1864, affirming a decision passed by the Sudder Moonsiff of that District, dated the 7th April 1864.

Sheik Golam Nujeef (Plaintiff), *Appellant*,

versus

Sun Sar Raja and others (Defendants), *Respondents*.

Mr. J. Baptist for Appellant.

Baboo Roopnath Banerjee for Respondents.

A person may be in wrongful possession of the land which he cultivates.

PLAINTIFF sued defendant for possession of land, and for mesne profits from 1265 to 1270, alleging that defendant was in wrongful possession as a trespasser.

The first Court held that plaintiff being the zemindar and defendant a cultivator of long standing, the case would be taken in the Collector's Court as under Act X of 1859. On a remand on appeal to the Principal Sudder Ameen, the first Court then held to its former opinion as the defendant filed certain receipts, showing his cultivation, jumma, and payment of rent, and it added that a cultivator could not be in wrongful possession as a trespasser, and that therefore plaintiff's allegation to that effect was incorrect. The suit was accordingly dismissed by the first Court.

The Principal Sudder Ameen, on appeal, held that the evidence adduced by plaintiff showed that defendant was in possession without a pottah, but that fact did not constitute wrongful possession, and that defendant did not deny the land to be plaintiff's property. The Principal Sudder Ameen accordingly held that the Civil Court had no jurisdiction and dismissed the suit.

The special appeal against this order is on the ground that there ought to have been

a distinct finding on evidence, whether defendant was a trespasser as alleged by plaintiff, or in the relation of a tenant paying rent to plaintiff, which rent was accepted by plaintiff as landlord from defendant as tenant.

We think this objection valid. We do not think that the judgments of the Lower Courts state, as they clearly should, whether, as a matter of fact, and irrespective of the only point found, *viz.*, that defendant cultivated, he cultivated as tenant of plaintiff or as a trespasser. The Lower Courts seem to have thought that because he was a cultivator, defendant could not be a trespasser. This does not follow as a legal or logical consequence, and we accordingly remand the case for re-trial with reference to the above remarks. The Lower Courts will take evidence on both sides to show whether plaintiff was landlord to whom rent was paid or was due from defendant, and whether defendant was a tenant from whom plaintiff received or could receive rent as from a tenant, or the contrary.

Remand accordingly.

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APPELLATE HIGH COURT.

No. 12.] APRIL, 1865. [Vol. II.

The 15th March 1865.

Present:

The Hon'ble C. B. Trevor, H. V. Bayley, and J. B. Phear, *Judges.*

Limitation (Regulation III of 1793, Section 14)—Evidence.

Case No. 59 of 1864.

Regular Appeal from a decision passed by Moulvie Nazeerooddeen Mahomed, Principal Sudder Ameen of Hooghly, dated the 9th December 1863.

Gopee Kishen Gossain (Plaintiff), *Appellant,*

versus

Bindabun Chunder Sircar Chowdhry and others (Defendants), *Respondents.*

Messrs. R. V. Doyne and *G. C. Paul*, and *Baboos Kishen Kishore Ghose* and *Ubhoy Churn Bose* for Appellant.

The Advocate General and *Baboos Mohendro Lal Shome* and *Bungshee Budden Mitter* for Respondents.

Suit laid at Rupees 69,730-13-2.

Discussion of the evidence required to prove admissions of indebtedness and promises to pay money for the purpose of obtaining the benefit of the saving Clauses of the old Limitation Law (Regulation III of 1793, Section 14).

Mr. Justice Bayley.—THE plaintiff and *pro formâ* defendant are two brothers, Gopee Kishen and Gunga Pershad Gossain, of Serampore.

The principal defendant is Bindabun Chunder Chowdhry, son of Suroop, and Sreesh Chunder Chowdhry, the grandson. The suit is termed in the plaint—"suit laid "at Rupees 69,730-13-2, principal and interest "due on a *kurarnamah*."

Plaintiff alleges that Suroop and Bindabun, from time to time, borrowed monies from plaintiff's father, Rughooram Gossain; that there was an adjustment of accounts on the 7th of Assin 1250, resulting in a balance of 31,702 rupees against Suroop Chunder Sircar; that a further sum of 6,000 rupees was then borrowed from plaintiff and the *pro formâ* defendant, Gunga Pershad, then and there, and Suroop and Bindabun executed a bond for the 6,000 rupees, and a kurarnamah for the liquidation of the 31,702 rupees and the 6,000 rupees; that it was stipulated in that kurarnamah that the indigo of the debtors was to be consigned to the creditors, and the proceeds carried to the credit of the former; and that, if this failed to liquidate the debt, further security should be given in the shape of mortgages of talooks; that rupees 5,237-2 were realized from the indigo up to the 18th Chyet 1250; that 76-3-9 was realized on 24th Assar 1253 from a payment in grain, and 79-2-9 on the 9th Assar 1254 from another similar payment—in all rupees 5,392-8-6 which went to the account of plaintiff and his brother Gunga Pershad; that from the 24th Aughran 1258 to 23rd Magh 1263, 12,500 rupees were paid to Gunga Pershad, the total payment thus being 17,892 rupees; that thus rupees 34,865-6-7 principal, and a like sum as interest remained due on the 3rd Magh 1263; that the defendants have been repeatedly called upon to pay, and have admitted their liability; that the co-sharer of a moiety of the same debt, Gunga Pershad, refused to be a co-plaintiff; consequently plaintiff brings this suit for his half 34,865 rupees 6 annas. The plaint concludes, the document "on which this suit is based, *viz.*,

"the kurarnamah, is herewith filed as per "separate list, and the remaining proofs will "be put in hereafter."

Defendants, Bindabun Chunder and Sreesh Chunder, deny the kurarnamah, and term it a forgery; they refer to the admission that Bindabun did not sign it when executed and to its not being registered, although covering so large an amount; and to the subscribing witnesses being residents at a distance from where the deed purports to have been executed, and as unknown to this defendant; they advert also to the insufficiency of the original stamp paper, and the purchaser of it being a stranger. This defendant also pleads that, as the kurarnamah concluded an adjustment of accounts, the old bond would have been given back; that the suit has not been brought within 12 years of the cause of action which, as alleged in the plaint, is the kurarnamah; that no payments were made in grain in 1253 and 1254; that the assessment of such payment is only made to avoid the operation of the Law of Limitation; that the sum of 12,500 rupees was paid to plaintiff's brother, Gunga Pershad, on account of an exclusive claim of the latter; and if there had been any other payments, they would have been duly endorsed on the kurarnamah; that no interest can be allowed; and that if the deed were a true one, and the allegation that payment had been often demanded in vain, true, the mortgage provided for in the deed would have been insisted upon; and it is not even alleged that such a requisition was made, especially as Suroop lived for five years after the alleged kurarnamah; and that it was most improbable that Gunga Pershad would have foregone so large a sum if due.

Defendant Gunga Pershad did not file any answer, but was examined as a witness.

The Principal Sudder Ameen put in issue the plea of limitation, the indebtedness of defendant, and his execution of the bond and kurarnamah, and the justice of the claim for interest. He has held that limitation bars the suit as the kurarnamah of 1250 was the real cause of action, and no payments in grain in 1253 or 1254 are proved, nor any promise to pay within 12 years gives a later cause of action and remove the bar. With a view to save needless remand, he has also considered the case on its merits, that is, on the second and third issues, and has held very much on the ground urged by the principal defendants in their answers, that the kurarnamah was never executed. The Principal Sudder Ameen has accordingly dismissed plaintiff's case.

The plaintiff has appealed to this Court, where it is pleaded, 1*st*, that plaintiff gave his evidence, while the principal defendants did not, both on limitation and the merits—then specially on limitation; 2*nd*, and the payments in grain in 1253 and 1254 are proved by Gunga Pershad's books and by testimony to them; 3*rd*, that the payments alleged by plaintiff to have been made by the defendants to Gunga Pershad as debtors on the joint account, have not been denied or disproved; that acknowledgment of indebtedness and promises to pay within nine years had been duly proved; and that thus limitation could not apply. There is another ground which we only notice to remark upon its inapplicability and impropriety. It is the 5th in which it is stated that the Principal Sudder Ameen finds that the case was really not barred by limitation, otherwise he would not have gone into the merits. But, in our opinion, the Principal Sudder Ameen really carried out a suggestion of Her Majesty's Privy Council in such cases, *i. e.*, that it might, in cases like this, be sometimes a convenience to record a judgment on points of law in bar, and also on the merits, so as to save the trouble, delay, and expense of a remand for a trial on the merits, in case the Higher Court found no bar in law

On the merits, the appellants rely upon evidence of plaintiff and of the witnesses on the record.

I am of opinion that limitation does not bar the suit, and that plaintiff's suit should be decreed. It is stated by appellant that the suit is not brought on the kurarnamah; but in my view this is erroneous, for the plaint in its concluding paragraph (as I have already noticed) clearly stated that the suit is brought upon the kurarnamah. It is admitted on both sides that, if that is to give cause of action, the suit is barred by the Law of Limitation. But appellant pleads that certain payments in grain in Assar 1253 and 1254, and payments to Gunga Pershad between 1258 and 1263, on account of the joint-debt to plaintiff and Gunga Pershad, and certain promises and acknowledgments of indebtedness and proposal to pay were made within nine years and up to the institution of the suit.

In respect to the alleged payments in grain, I am of opinion that the improbability is very great that two remittances in grain of the trifling amounts of rupees 73 and rupees 79 respectively, should be made in

liquidation of a debt or more than 30,000 rupees, especially as indigo is the only produce which, was, in any way, referred to in the kurarnamah, or in any way appearing, except in these two items in the books, as a credit in payment of the debt.

But I think that the evidence sufficiently shows that these payments made to Gunga Pershad as on account of this *joint-debt* between 1258 and 1263 and promises to pay an acknowledgment of indebtedness to plaintiff within nine years of the suit, are duly proved. These facts will, in my view, suffice to bring the cases within the purview of Section 14 Regulation III of 1793; the law which, it is admitted by both parties, applies to this case.

I come to the conclusion that the payments to Gunga Pershad, were on account of the *joint*-debt, because it is in no way satisfactorily shewn that there was any debt of that account owing to Gunga Pershad alone; or that there was not the ancestral debt to Rugoo Ram, or that Gunga Pershad and Gopee did not inherit this debt as one of the assets of the estate of Rugoo Ram; while, in addition, the payment is clearly established of 12,500 rupees to Gunga Pershad between 1258 and 1263.

As to the debt being a *joint-debt*, I think it proved by the evidence of the plaintiff, which is clear and apparently straight-forward, and against which defendant, Bindabun, does not choose to tender his own evidence. Then, we have the evidence of Gunga Pershad, plaintiff's brother, which is not only in this particular, but, as will be referred to hereafter, of an evasive and unsatisfactory nature. He deposes on this point thus:—"by 3 or 4 payments, I have received 12,500 rupees relating to paternal account-books, as well as by the loans advanced on my own account." Again—"I believe the greater portion of the money was due from the paternal account, and up to this date money is due to me from the defendants." But not a tittle of confirmation or proof of any such private debt is advanced. In other parts of this deposition are to be found statements that the debts were entered on certain accounts of 1250, but these accounts were said by this witness to have been mislaid by his amlah.

The witnesses who proved the debt to be joint, and the payments to Gunga Pershad as on such an account are Judonath Sein, Brojendur Chunder Lahooree, Huris Chunder Lahooree and Rooderpersad Chowdry; these last are both very clear on this point.

The acknowledgment of indebtedness to plaintiff and of proposals to pay plaintiff are, to my mind, proved to have been made within the period of 12 years by the evidence of Gunga Narain Chowdry, Becharam Gossain, Pearymohun Gossain, Prosunno Chunder Lahooree, Bugwan Chunder Lahooree, Huro Chunder Lahooree, Sreenath Chuckerbutty, Ram Chunder Ghose, Gungadhur Lahooree, and Roodopersaud Chowdry.

After a careful consideration of the above evidence on the points of the payments to Gunga Pershad having been made on account of the joint-debts and acknowledgments of the indebtedness to plaintiff, and proposal to pay—all having occurred within twelve years of suit—I cannot but come to the conclusion that it is credible; and I, accordingly, hold that limitation does *not* bar this suit.

On the merits, I have to remark that the plaintiff in this case, Gopeekisto, the brother of Gunga Pershad, comes forward himself as a witness in the case, and deposes in a clear manner to the transaction—to the execution of the kurarnamah, and the bond for 6,000 rupees. But on the other side, the defendants do not tender their depositions. I would record the remarks on the points made by the Court in page 383 of Hay's Reports, 5th November 1862, Rammohun Mookerjee *versus* Rajkisto Deb:—

"If parties will not come forward and give "their own evidence in cases in which such "evidence is most important, and the best "that can be obtained, they must not com- "plain if their written statements verified by "their mooktears and not by themselves "and supported by the evidence of menials "and a class of witnesses of whom any "number can be obtained to prove any fact "that is wanted, are not believed. The "Court will require the best evidence to be "given, and will not be satisfied with the "evidence of inferior witnesses put forward "by the parties themselves while they re- "main in the back ground and plead their "prejudices as an excuse for their absence. "As this rule comes to be more generally "acted upon, fewer false causes will be put "forward, and the occupation of hired wit- "nesses be gone."

Then we come again to the evidence of Gunga Pershad, plaintiff's brother, who refused to join him in this suit, though, in his testimony, he deposes that he believed the bond for 6,000 rupees to be genuine; and as to his ekrar, he says he had no *remembrance* of it. Now, it was not such an act or such

a transaction as to escape memory, and so we regard this plea of want of recollection as a base subterfuge. Gunga Pershad clearly proves that defendants borrowed money from the father, and that the greater portion, some at least of the 12,500 rupees he admits to have received, was on account of the paternal debt and not his own. Some, the account-books of 1250, would have clearly shown by the credits and debits on adjustment recorded the character of the debt in the kurarnamah; but though these were admitted by Gungah Pershad to have been extant at the time of the suit, he deposes that that which was required had been lost by his amlahfor that particular year.

In short, to our view, the whole evidence of Gunga Pershad shews reluctant suppression of what he knows.

Then Gunganarain Chowdhry, Hurish Chunder Lahoree, Bhugwan Chunder Lahoree, Sreenath Chuckerbutty, Ram Chunder Ghose support the plaintiff's deposition as to the execution of the kurarnamah and bond. The subscribing witnesses to the kurarnamah of 1250, one Ram Dhun Tewaree a dewan, and Ram Coomar Bose, are stated to be dead. The third, the writer, by name Bissessur Bagchee, is a servant of that brother Gunga Pershad, who is admittedly hostile to plaintiff; and the absence of this witness, therefore, under such circumstances as this case developes, is no matter of wonder in this country. On the whole, I consider the kurarnamah to be proved, and I would decree the claim for the principal sum to be just and proper.

As to the interest, I think that as, throughout, the joint-debt and the proposals for settlement and the acknowledgment of indebtedness have all been denied (and as I think falsely), and a hostile brother has come or been brought in the case to aid the false defence by which the plaintiff has been kept out of his money, interest at the full legal rate of 12 per cent should be awarded.

As to costs, Bindabun and Sreesh Chunder will pay all costs except those of Gunga Pershad, who will pay his own costs.

Interest at 12 per cent is awarded on the costs till realized.

Mr. Justice Phear.—I regret that I cannot concur in Mr. Justice Bayley's conclusions upon the issue as to limitation. In my judgment, this suit is barred by the operation of Section 14 of Regulation III of 1793. The relieving part of that Section is very exact in laying down the conditions upon which alone the rigid rule previously prescribed shall be released in favor of the suiter.

These conditions are three in number. Taking them in reverse order, the third is: "unless the complainant shall prove that "either from minority or other good and "sufficient cause, he had been precluded "from obtaining redress." Now, the plaintiff in this case certainly has not brought himself within this provision, for however reasonable may be the cause of his delay regarded from any social point of view (of which I say nothing), he has not attempted to make out that there existed during the period of that delay any cause whatever to *preclude him from obtaining redress.*

The second condition is, "unless the "claimant directly preferred his claim with-"in that period (12 years before suit) for "the matters in dispute to a Court of com-"petent jurisdiction to try the demand, and "shall assign satisfactory reasons to the "Court why he did not proceed in the suit." It will de conceded that the plaintiff can get no benefit from this, for he brought no suit at all in the matter before 1850.

Then the only question on this issue, is, does the plaintiff, in the words of the 1st, condition, "show, by clear and positive "proof, that he had demanded the money "or matter in question, and that the defend-"ant had admitted the truth of the demand "or promised to pay the money!" In my "opinion, nothing of the kind is shewn.

Assuming the genuineness of the ekrarnamah, and that the statement of accounts comprised in, it was always present to the mind of the parties during the transaction in evidence, and assuming that payment to one of two joint and several creditors on account of his share, would be an acknowledgment of debt to the other as regards his share available in a separate suit (all of which admit of argument), the clear and positive proofs contemplated by the enactment, must be sought in the two several consignments of grain in 1250 and 1254 in the payments made to Gunga Pershad between 1258 and 1263, and the alleged acknowledgments of indebtedness made within nine years of date of suit. I am unable to gather, from any of these or all of these, that a demand of the *amount of debt in dispute* was ever made by the plaintiff, and that the defendant either admitted the truth of that demand or promised to pay it.

The consignments of grain are really worthless as evidence on this point; for there was not a scintilla of proof that they

were taken by either party to be payments in kind made in respect of *any debt whatever*.

The large payments made to Gunga Pershad between 1250 and 1263 were confessedly in pursuance of a compromise of some *larger* claim; there was no evidence to show specifically what that larger claim on Gunga Pershad's part was, still less that it was confined to the subject matter of the ekrarnamah; *a fortiori* these payments could not operate as an admission of the claim which the *plaintiff* would be entitled to make, or perhaps had made (though we have no evidence of it) under the ekrarnamah, nor did they imply a promise to pay such a claim.

Lastly, as to the admissions of indebtedness, there is some doubt whether any of them were made to the plaintiff himself, but supposing they were so, it is clear to my mind that they did not amount to a promise to pay the amount due under the ekrarnamah (or in any other manner specifically defined) or to an acknowledgment of any specific claim. On the contrary, the ekrarnamah was never named, and no specific sum was claimed on behalf of the plaintiff either expressly or impliedly, and the promise, if promise there was, extended to a less sum than that which is now said to be really due. In fact, the transaction was at most an attempt at compromise, and, as such, entirely without the spirit of the Statute.

For the above reasons, I am of opinion that the plaintiff has not brought himself within the saving Clauses of Section 14 of Regulation III of 1793, and that, therefore, his suit is barred by lapse of time. Under these circumstances, I do not think it necessary to consider the issues on the merits of the case.

Mr. Justice Trevor.—This is not a matter to be referred to a third Judge. Mr. Justice Phear agrees with the Lower Court in thinking that the evidence of the payments alleged to have been made by the defendant, with a view of bringing the matter within the period allowed by the Statute of Limitation, is insufficient for that purpose, and he has determined accordingly, and this determination, under Section 23 Act XXIII of 1861, is final.

The 15th March 1865.

Present:

The Hon'ble C. B. Trevor, H. V. Bayley, and J. B. Phear, *Judges*.

Enhancement—Construction (of pottah).

Cases Nos. 107 and 108 of 1864.

Special Appeals from a decision passed by the Principal Sudder Ameen of Jessore, dated the 10th October 1863, affirming decisions passed by the Moonsiff of that District, dated the 27th December 1860.

Punchanun Bose and others (Plaintiffs), *Appellants*,

versus

Peary Mohun Deb (Defendant), *Respondent*.

Baboos Hem Chunder Banerjee, Chunder Mohun Bose, and *Aushootosh Dhur* for Appellants.

Baboos Kalli Mohun Doss and *Onoocool Chunder Mookerjee* for Respondent.

The stipulation in a pottah, "after this, in no manner shall enhancement be demanded," precludes enhancement during the existence of the pottah notwithstanding in a preceding part of the pottah the words "year by year" are used. *(Dissentiente*, Bayley, J.)

Mr. Justice Bayley.—THE pleaders on both sides admit that one and the same decision in this Court, will govern both these appeals.

Plaintiff, as purchaser of a putnee-property sued to enhance the rents of the lands of defendant under legal notice.

Defendant pleaded that he held in perpetuity at a fixed rent, and that the terms of the lease showed this; further that the manager of the previous putneedars had confirmed the lease.

The plaintiff pleaded in the Court of first instance that the lease propounded by defendant purported to have been given by a Naib or collecting agent; that no such Naib had authority to give such a lease; that plaintiff was not bound by it; that the confirmation of the managers of the previous putneedars did not give it validity; and that the terms of the lease were not such as, according to law or usage having the force of law, were those of a real mokurruree or lease in perpetuity on a fixed rent. Both the Lower Courts dismissed plaintiff's suit.

The Lower Appellate Court, whose judgment is that with which we have to deal in this special appeal, gave its reasons in these terms:—

"It is clearly stated in the said dol "papers and the pottah that no rate over "and above that mentioned in these docu-"ments shall be demanded in future. At "the same time, there is proof among the "records of the defendant, the purchase

"of the *jumma* (or ryot's rights) from the "former lessees, paying from that date "uniform and fixed rates."

The pleas now urged on us in special appeal are :—

I. That the Naib had no power to grant such a lease in perpetuity at a fixed rent.

II. That the terms of the lease did not convey such a lease.

On the first point, I may observe that although a Naib, without special authority to grant leases in prepetuity at fixed rent, has not such a power within the ordinary scope of his duties, still in this case it is no longer denied that the lease of defendant was ratified by the general manager of the former putneedars, and it did lie within the scope of his ordinary duties as such manager to grant or ratify such leases in prepetuity on a fixed rent. This plea is, therefore, untenable.

On the *second* plea, I notice that there is not, as is ordinarily the case in mokurruree leases, *i. e.*, leases on fixed rents in perpetuity, the specification *mokururee* or *istimraree*, or the usual provision for its being a hereditary lease in perpetuity by the use of the words *nushlan bad nushlan*, or *ba furzandar* or *pootro poutradi*. The words in the lease relied on by defendants are these: "Having, according to the instalment, paid "the rent, *yeer after year*, you may continue "to enjoy the profits. After this, in no man"ner shall enhancement be demanded. You "also shall not raise any objection as "to inundation, draught, or anything "else."

I do not read these words as conveying a hereditary lease in perpetuity at a fixed rent. The words "*year by year*" refer to the payment by the instalments in the years detailed in the lease, and it would, in my opinion, be a wrongly strained and improperly forced construction of them to read them, as defendants contends that they should be read, as giving a perfect mokurruree. The provision that no increase will be demanded is not unusual in ordinary leases or kubooleuts for short periods, and refer to that condition being in force for these periods. I think my view in this case is confirmed by the Sudder Dewanny Adawlut's Decisions pp. 1572 and 1575 of 1859. I hold that the notice under Section 13, is a notice that the terms of the lease must be altered, if the relation of the landlord and tenant is to continue; and that includes notice of the cancellation of the pre-existing lease, unless he terms be so altered.

I would decree this appeal with all costs on respondents; but, as Mr. Justice Phear differs, let the case be sent by the Registrar at once for a third voice or a Full Bench.

Mr. Justice Phear.—I agree with Mr. Justice Bayley as to the first point of the special appeal; but as I unfortunately cannot concur with him in his final conclusion in respect to the remaining part of the case, I give my own views in a separate form.

According to the Sudder Dewanny Adawlut's decision in 1859, page 1575, the words "year after year" in the pottah create a yearly tenancy determinable every year at the option of either party. Therefore, if these words stood alone, the suit for enhancement would lie during the pendency of the pottah, because the holding would then be under a "written engagement, not specifying the period of such engagement" within the terms of Section 13 of Act X of 1859. But then comes the question what is the meaning of the stipulation "after this in no manner shall enhancement be demanded?" It can hardly be said to refer to the payments or instalment to be made in the first year, because it is conceded that they are absolutely fixed and incapable of enhancement. It was, however, urged before us that these words were a mere common form following on the mention of the rent, and intended only to give emphasis to what preceded; so that the whole would, in effect, run thus "you shall enjoy the land at the first "mentioned rent, and until I enhance that "rent, I will not ask more on any pre"text, and you shall not seek abatement "for any reason." This construction certainly does not recommend itself to my mind. I cannot help thinking that the Court is bound, if possible, to give effect to all the words of the contract, and ought not readily to treat any portion of them as so much useless verbiage; and I have the more difficulty here in acceding to the view that the clause in question is surplusage and mere words of course, because I observe that both the Native Judges below have considered that it even operates so far as to create a mokurruree tenure.

On the whole, I have come to the conclusion that the words under consideration amount to an undertaking on the part of the landlord that during the whole period that he should allow the tenant to hold on under this pottah, he would not enhance the rent. Then, is the pottah still in force? I am of opinion that it is. Nothing has happened to

put an end to it, unless the legal notice to enhance given by the plaintiff before the commencement of this suit amounts to such a reasonable notice of a desire to terminate the yearly tenancy as is contemplated by the Court in Sudder Dewanny Adawlut's decision, 1859, page 1575. It seems to me that it is not so. In this case, no doubt the rent is the material term in the pottah, and a notice of alteration of that may be said to be really a notice of termination of the pottah. But it might have been otherwise; the pottah might have contained important continuing stipulations with regard to repairs, making of tanks, clearing lands, &c., in which case the notice of enhancement of rent would not, in my judgment, necessarily have implied a termination of the lease, and, therefore, I think it does not of itself so imply it in any case.

With these views, I am of opinion that the landlord is still bound by his covenant, and that, therefore, the Court ought to dismiss the appeal with costs.

Mr. Justice Trevor.—In these two cases the grants made by the zemindar to the defendant are of two gantee jummas. It is unnecessary to enter into the legal incidents of such tenure, that is, whether they are hereditary in their nature or not, for that question is not raised in the present cases. The only contention before me is whether the terms of the general leases debar the plaintiff, in the eye of the law the representative of the zemindar the grantor of them, from raising the rents of the tenants. I am of opinion that the terms used in the leases, and cited by Mr. Justice Bayley, debar the plaintiff from enhancing the rent of the gantee jummas; and that, unless they do have this effect, they are meaningless. The Court cannot adopt a mode of construction which would lead to this result. It rather adopts that which will give to all the terms of the instrument full significance. Under this view, holding that plaintiff cannot enhance the defendant's tenure, I concur with Mr. Justice Phear in dismissing the special appeals of plaintiff with costs.

The 15th March 1865.

Present:

The Hon'ble C. B. Trevor, H. V. Bayley, and J. B. Phear, *Judges.*

Appeal (by some of the defendants)—A co-defendant made a respondent.

Case No. 3107 of 1863.

Special Appeal from a decision passed by Mr. R. H. Russell, Judge of Midnapore, dated the 14th August 1863, reversing a decision passed by the Sudder Ameen of that District, dated the 21st March 1863.

Sreemutty Khermukuree Dossee (Plaintiff), *Appellant,*

versus

Nilambur Mundul and others (Defendants), *Respondents.*

Baboos Gopeenauth Mookerjee and *Mohendro Lail Shome* for Appellant.

Baboos Chunder Madhub Ghose, Kalee Mohun Doss, and *Hem Chunder Banerjee* for Respondent.

It is not competent to certain defendants appealing and making a non-appealing defendant a respondent between themselves, to open out that portion of the case which, as between the plaintiff and the non-appealing defendant, has not been appealed against (*Dissentiente,* Bayley, J.).

Mr. Justice Bayley.—In this case, plaintiff sued for possession of certain lands as the self-acquired and exclusive property of the vendor Bonomali, on the allegation of the execution of a deed of sale in his favor.

Plaintiff made the alleged vendor and other parties claiming to be co-parceners with the vendor defendant.

The alleged vendor in his answer denied having sold the property to plaintiff; he also denied the execution of the above deed. He further pleaded that he could not have sold the property as it was *joint* property in a joint undivided Hindoo family, and not his exclusively to sell.

The other defendant pleaded to the same effect.

The Court of first instance held that the plaintiff's deed of sale was genuine and authentic, and that the property conveyed by the deed was the exclusive and self-acquired property of the alleged vendor. The first Court, therefore, decreed plaintiff's claim.

The alleged vendor did not appeal; but the other parties *did* so on the ground that the property was joint and not self-acquired, and that the alleged vendor could not execute the deed, and that it was *not* executed at all by him. The alleged vendor was made a respondent by his co-defendants who had appealed, and thus appealing, objected under Section 348 to the decree of the Court of first instance.

The Lower Appellate Court found as a fact on the evidence in this appeal that the pro-

perty was joint and *not* self-acquired; and that the deed of sale propounded by plaintiff was never executed by the alleged vendor. The Lower Appellate Court accordingly dismissed plaintiff's suit.

Plaintiff appeals specially, and the two points urged before us and very well argued by the pleaders on both sides, were:—

1*st*. Could the Lower Appellate Court decide this case when the alleged vendor did not appeal?

2*ndly*.—Could it do so on the ground that the vendor, appearing as a respondent, had under Section 348 Act VIII of 1859, a right to be heard as if he had been an appellant?

I think that the result of this case as a special appeal does not really depend on these points; because the Lower Appellate Court found as a fact, from the evidence, that the deed of sale, on which title alone plaintiff claimed, was never executed; and that the property was *joint*, and not the property of the vendors.

The Lower Appellate Court so found upon a record brought in appeal before it by parties who undoubtedly did and could appeal, namely, the *co-sharers* in that joint property, the defendants below.

As, on their appeal, the Lower Appellate Court found *this fact*, that of itself was, in my opinion, sufficient in order to authorise it to dismiss plaintiff's suit as it did.

The Lower Appellate Court does not record that the appeal was taken up as that of the respondent, co-defendant, the alleged vendor. It merely says that he appeared as a respondent and objected under Section 348.

I think, therefore, the special appeal may be dismissed as it will not lie against the above *finding of fact*.

As, however, the two points above noted have been fully and well argued, I would say on the first point that, under Section 337 of Act VIII of 1859, I think the Lower Appellate Court could decide, as it has done, on the appeal of the co-sharers, because the "*ground*" of title "*common to all*" was that which was found by the Lower Appellate Court to exist, *viz*., the *co-parceny of the appellants in the property sold*, and the non-execution and invalidity of the deed of sale by which the *property of the appellant's co-sharers was purported to be conveyed to plaintiff*, and which deed was plaintiff's sole ground of title.

In this case I, of course, confine myself primarily, on this point, to the words of the Statute, cited Section 337. But that law, merely to my view, carries out the principal enunciated in Construction 997 and Tarachand Lahooree's case, dated 7th June 1852, page 464 (13 lines from bottom), and in subsequent decisions of the late Sudder Court, *viz*., "In all cases in which the *issues* between all the plaintiffs and all the defendants are *identical*, and in which respectively the parties come in upon the *same interests* and upon the *same pleas*, thus engaging in one common suit, a single defendant who takes upon himself the *onus* of appealing on the full amount of stamp, should be allowed to assert *his own rights* though his co-defendant is unwilling to join in the appeal."

Here, plaintiff's case rested solely on the deed of sale which he propounded. The alleged vendor who did *not* appeal and the co-parceners who *did* appeal (all these parties being defendants below) put in *issue* there the *identical points*, *i. e*., Was the deed of sale executed? Was the property joint? Were their interests then not the same? The alleged vendor, defendant, pleaded that he did not sell. The co-parcener's defendants pleaded the same. The alleged vendor said that he could not sell, because the property was *joint*. The co-parceners pleaded the *same*. Were not then the *interests* and the *pleas* the same?

I think then that, both by Section 337 Act VIII of 1859, and by the force of previous decisions, the Lower Appellate Court could decide this case upon the appeal of the co-parceners.

I am free to admit upon the *second* point that I do not think that a defendant, made a respondent by a co-defendant, can come within the purview of Section 348 as "*the* respondent." "The" respondent in this case was the plaintiff who contested with all the defendants below whether he should or should not have possession of certain property under an alleged deed of sale. A defendant could not interplead with a co-defendant below. A defendant who is made a co-respondent by a co-defendant who is an appellant, is still in the legal (or illegal) relation of defendant interpleading with a co-defendant. And although in the appeal such defendant has another name from his co-defendant (the latter being called *appellant* and the former *respondent*), such respondent is not "the" respondent who is contemplated to be the party who, as respondent in the appeal, can be heard as if he had preferred a separate appeal from such decision. He is more a *pro*

formâ than a *real* party to the appeal. This last is the respondent who has to conduct a full and complete contention with the appellant.

Having these views on these two points, which I have given under the circumstances of this case, still as, in regard to the main point in this special appeal, I would dismiss it with costs for the reasons given in the first part of this judgment, *viz.*, because we have no power to interfere on the clear finding of fact come to upon the evidence on the record before the Lower Appellate Court on the appeal of those who were really appellants.

As Mr. Justice Phear differs in regard to this case, let the Registrar move the Chief Justice to refer it to a third voice or other Full Bench.

Mr. Justice Phear.—In this case I have the misfortune to differ in opinion from Mr. Justice Bayley. I understand the ground of special appeal to be essentially this, namely, that the judgment of the Lower Appellate Court was bad in law for reversing the *whole* of the decree below, whereas that Court had no jurisdiction to deal with that decree except so far as it affected those of the original defendants who *appealed*.

Although the case comes to the High Court by way of special appeal, it is substantially an application to set aside the decree of the Lower Appellate Court so far as it purports to be binding between the special appellant and Bonomali, the original defendant who did not appeal below. And this step is necessary for the protection of the special appellant, supposing she has a right to be protected, because as both she and Bonomali are parties to the record, all the material findings of the Appellate Court are binding upon them.

I think the ground of special appeal is valid.

On the part of the special respondents, two points were made—

1*st*. That Bonomali, having been made a respondent, no matter by whom or for what reason, was then enabled under Section 348 of Act VIII of 1859, to place himself in the position of an appellant; that he has done so; and that thus in effect all the original defendants have become appellants.

2*nd*. That the decision of the Lower Court proceeded on a ground common to all the defendants, because it disposed of an issue in which all had joined, and that, therefore, the Appellate Court was enabled by Section 337 of Act VIII, on the appeal of *some only* of the defendants, to reverse the whole decree.

It seems to me that each of these points exhibits a misconstruction of the Statute.

It should be premised that, as the special appellant had no hand in making Bonomali a co-respondent, and could do nothing to prevent his being so made, the consideration of the 1*st* point is disembarassed of all question as to estoppel.

To my mind, Section 348 simply contemplates the case of a respondent who has obtained a decree in the Court below on a judgment, which, on some facts or some issues, is adverse to him; and the object of the Section is to enable him, when brought into Court, to defend his decree on appeal, if necessary for the purpose of keeping it in the face of possibly new findings of the Appeal Court, to avail himself, at the last moment, of any objections to the finding of the Judge below, whether of law or fact, although not previously specified in the same way as he might have done, had he been appellant and had duly specified them. It relieves him from being forced to stand or fall by the portions of the judgment below which were favorable to him. It seems to me that this was very clearly explained in the judgment of the High Court given in the case of Issur Ghose *versus* James Hills, reported in page 350 of Hay's Reports, 1863. I do not think that the Section in any way operates to alter the respondent's relation to the decree below. It does not transfer him, if the phrase may be used, from the plaintiff's side of it to the other, or *vice versâ*, as the case may be. And I conceive this to be the view taken by the High Court in deciding that the Section "does not apply between co-defendants but solely as between appellant and respondent." (*See* Sreemuttee Buroda Dossee *versus* Nobo Gopaul Mullick, Legal Rem. page 78.)

Again, it appears to me that Section 337 applies only to those cases where the Court below has made a decree against several persons, whether plaintiffs or defendants, upon a *finding* of law or fact which applies to all the persons alike. In such a case, the Section enables the Court of appeal, on the application of any one or more of the persons decreed against, to affirm, modify, or reverse the *whole* decree, as well with regard to its force against those who did not appeal, as against those who did.

The case before us was a suit to obtain possession of land which the plaintiff alleged was conveyed to her by the first defendant Bonomali. Bonomali denied that he ever

executed such a conveyance. The other defendants joined in this plea, and further alleging that the land in dispute was the joint property of themselves and Bonomali, pleaded that, as they were not parties to the conveyance, it could not be operative against them. The Sudder Ameen decreed in favor of the plaintiff, adversely, no doubt, to all the defendants alike; but as against the two sets of defendants respectively, the decree was based on widely different grounds. As against Bonomali, it was based on the ground that he had executed the conveyance. This of itself would not have supported a decree against the other defendants, although, no doubt, (as was ably urged before us) an opposite finding on this point would certainly have decided the suit in their favor. It is not enough, however, that the suit *might* have been determined by a decision of the Court upon some one issue common to all the parties decided against; still less that it was *capable of being* so reversed, or actually was so reversed in the Appellate Court. The question *is*, was it so determined in the Court below; and, in this case, I conceive, the answer must be in the negative. The finding, which was the sole ground of decision against Bonomali, did not touch the main defence of his co-defendants: as against them something quite independent of it was necessary, and accordingly the Sudder Ameen, before he could decree against them, was obliged to find that they had no interest in the land.

Without the enactment under discussion, the Appellate Court could always entertain appeals brought by a portion only of the persons aggrieved by a decree below, so far as that decree affected them alone. If the decree below as against the actual appellants could *only* be dealt with on grounds which applied with equal force to its validity with respect to those who did not appeal as to those who did, it would seem anomalous and for strong reasons undesirable that it should be reversed or modified as against the one, but be left in full force against the other; and it was against this result, as it seems to me, that Section 337 was intended partially to provide. The words of the enactment expressly confine the jurisdiction thus conferred on the Appellate Court to the case where the *decision below* proceeded on a common ground; and although the accruing benefit is consequently somewhat less than that measured by the reasons just suggested, still it is easy to see that much inconvenience might have ensued from making this jurisdiction depend upon whether or not the decision of the Appellate Court itself *might eventually* be made upon such a ground.

Lastly, it was argued that no ground of special appeal had been shown in this case, because, had Bonomali appealed, the result to the special appellant would have been the same as at present—that, in fact, the Court having decided against the party who appeared, notwithstanding the absence of his opponent, it must be presumed *a fortiori* that it would have done so had the opponent appeared. Be this as it may, it is beside the present question. If my view of Section 337 is correct, the appellants below could not bring the issue, which was decided by the Sudder Ameen as between the special appellant and Bonomali, before the Lower Appellate Court, because it was not the ground of his appeal against *them*: therefore, the Lower Appellate Court, in entertaining and deciding that issue, acted without jurisdiction.

For the foregoing reasons, I think that the decree of the Lower Appellate Court must be declared to have no operation as between the special appellant and Bonomali.

Mr. Justice Trevor.—The question before me is whether it is competent to certain defendants appealing and making a non-appealing defendant a respondent between themselves, to open out that portion of the case which, as between the plaintiff and the non-appealing defendant, has not been appealed against. It is contended that, both under Sections 348 and 337 of Act VIII of 1859, such a course of procedure is admissible.

It appears to me that Section 348 only rules, that, in cases which are partly given in favor of and partly against a person, if the other side appeals, he, as respondent, is entitled to take any objection which he might have taken if he had preferred a separate appeal from such decision. It consequently is quite inapplicable to the present case.

Looking to Section 337, it rules that, when there are two or more defendants in a case and the decision of the Lower Court proceeds *on any ground common to all*, any one of the defendants may appeal against the whole decree. In the present case, the judgment of the Lower Court was passed against Bonomali on the ground of the execution by him of a deed of sale, and against the others on the ground that they opposed the plaintiff's enjoyment of his purchase wrongfully. The ground on which the decision was given was not common to all, and therefore Section 337 does not apply.

But it appears to me quite clear on principle that appellants can only appeal regarding their own rights which have been invaded by a decree which appears to them unjust; and that, consequently, it was not competent to the appellants in the case before us to open out any question as to the genuineness of the deed executed by Bonomali who did not appeal; they could only question the extent of the rights which had been declared to belong to Bonomali to their detriment.

Under this view, I concur with Mr. Justice Phear in thinking that the decree of the Appellate Court as between the plaintiff and Bonomali has no legal operation. As, however, it is necessary for the Lower Court to determine what was the extent of Bonomali's rights really covered by the deed of sale not questioned by him, the case must be remitted to the Judge for enquiry upon this point; and judgment must be passed in plaintiff's favor in accordance with the finding come to on it.

The 16th March 1865.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Principals and Agents—Presumption.

Case No. 1410 of 1864.

Special Appeal from a decision passed by Baboo Koylash Chunder Deb, Principal Sudder Ameen of the 24-Pergunnahs, dated the 4th March 1864, *reversing a decision passed by Mr. H. C. Bell, Sudder Ameen of that District, dated the 5th June* 1863.

Ram Narain Potdar (Plaintiff), *Appellant,*

versus

Ramnauth Shaha and others (Defendants), *Respondents.*

Baboo Anund Gopal Paleet for Appellant.

None for Respondents.

A mere admission of an agency to sell will not necessarily raise a presumption of an authority to buy on credit, or otherwise to pledge the credit of the principal.

APPELLANTS, plaintiffs, seek to render certain parties liable for debts incurred by an agent. They rely on the admission of the defendants that they employed the agent to sell produce. But they have not shown, either that express authority to pledge the credit of the defendants was given to the agent, or that the defendants, by their course of dealing, have impliedly recognised any such authority. A mere admission of an agency to sell will not necessarily raise a presumption of an authority to buy on credit, or otherwise to pledge the credit of the principal. The appeal is, therefore, dismissed.

The 16th March 1865.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Evidence—Documents added to, but still partially genuine.

Case No. 1576 of 1864.

Special Appeal from a decision passed by Baboo Doorga Pershad Ghose, Principal Sudder Ameen of Nuddea, dated the 30th March 1864, *affirming a decision passed by Baboo Gopeenauth Bose, Moonsiff of that District, dated the 30th January* 1862.

Sûrbomungula Dossee (Defendant), *Appellant,*

versus

Maharajah Sutesh Chunder Roy (Plaintiff), *Respondent.*

Baboos Motee Lall Mookerjee and *Hem Chunder Banerjee* for Appellant.

Baboos Sreenath Doss and *Bhuggobutty Churn Ghose* for Respondent.

A document found to have been subsequently added to, yet in some degree accepted as genuine, is not inadmissible in evidence.

Perpetual leases for building are only protected as held at a fixed rate, when the rent is fixed by the original leases.

A REVIEW was admitted on production of fresh evidence, *viz.*, among other things, a kubooleut. The Court, on examination, found that matter had been subsequently added beneath the original kubooleut, and that it could not be considered a document binding between the parties; but that, nevertheless, being in some degree accepted as genuine, it was evidence *quantum valeat.* Appellant objects to its reception in evidence; but we think there is no reason in law to debar the Court below from weighing the document as evidence.

It is also urged that, inasmuch as houses were built on the land with plaintiff's knowledge, defendant is entitled to hold at a fixed rate. But the law only protects as

held at a fixed rate, perpetual leases for building when the rent was fixed by the original leases; in this case the alleged lease at a fixed rate is found to be a forgery.

We think it necessary, however, to remand the case to enquire whether all the land is "Bastoo," or what was its character? The Court below has, it appears, assumed in that evidence that all the land is Bastoo. The new assessment must be paid after ascertaining the character of the land, and the rates prevailing for each quantity.

Remand accordingly.

The 16th March 1865.

Present:

The Hon'ble C. Steer and E. Jackson, *Judges.*

Raj of Keonghur (Succession to)—Family Custom (sons by low caste wives).

Case No. 287 of 1864.

Regular Appeal from a decision passed by Mr. R. N. Shore, Superintendent of Tributary Mehals in Zillah Cuttack, dated the 23rd November 1863.

Ranee Bistooprea Patmohadea (Plaintiff), *Appellant,*

versus

Basoodeb Dull Bewartee Patnaik, Guardian of Rajah Dhunonjoy Bhunj, minor, and others (Defendants), *Respondents.*

Mr. R. T. Allan and *Baboos Dwarkanath Mitter* and *Mohendro Lall Shome* for Appellant.

Mr. R. V. Doyne and *Baboos Unnoda Pershad Banerjee, Onookool Chunder Mookerjee, Tarucknath Sein,* and *Nil-Madhub Sein* for Respondents.

Suit laid at Rupees 35,009-2-11.

Suit for the Raj of Keonghur. HELD upon the evidence that there was no proof of the adoption set up by the plaintiff on behalf of her son.

According to the family custom of the Raj, the sons of a Rajah by wives of a lower caste than the Rajah, rank after the sons by wives of the same caste as the Rajah.

THIS is a suit for the Raj of Keonghur, one of the Cuttack Tributary Mehals. The suit was instituted in the first instance, under the provisions of Regulation XI of 1816, before the Superintendent of the Tributary Mehals, and this appeal is preferred from his decision.

The plaintiff is the widow of the late Rajah Gudadhur Narain Bhunj, who appears to have died suddenly of cholera while performing a pilgrimage at Tribeni, on the 11th Choitro 1268, corresponding with 23rd March 1862. The plaintiff claims the Raj in behalf of a minor Bindabun Chunder Bhunj, a nephew of the Rajah of Mohurbhunj, who, she alleges, was adopted as his son by her late husband on the 20th Falgoon 1268, in the town of Balasore. The defendant, Dhunonjoy Bhunj, is said to be the son of the late Rajah by a Phoolbehaee marriage, and his right to succeed to his father has been recognised by the Superintendent of the Tributary Mehals and by the Government, and consequently he is now in possession of the Raj.

The Superintendent of the Tributary Mehals was of opinion that the allegation as to the adoption of the minor Bindabun Chunder Bhunj, by the late Rajah, was "a falsehood from beginning to end;" and he, accordingly, dismissed the plaintiff's suit.

The whole question before us on this appeal relates solely to this adoption, though the arguments which have been urged in favor of the plaintiff's case have extended far beyond this point; the plaintiff's vakeels contending that the truth, as to the fact of the adoption, depended very materially on the question whether the defendant was a son of the late Rajah, and, if a son, whether he was born of such a marriage as entitled him to succeed to the Raj on the death of his father? We did not like to stop the plaintiff's vakeels in the course of their arguments upon these points; but we are of opinion that it is not necessary for us to go fully into these questions until we are satisfied that the adoption of Bindabun Chunder Bhunj did take place. Even, if the defendant could not prove that he was the late Rajah's son, and such a son as would be entitled to succeed to the Raj, it would not follow that the plaintiff's claim for Bindabun Chunder to be the late Rajah's adopted son is to be at once taken for granted. The plaintiff's claim must stand or fall upon its own merits, independent of the sufficiency or otherwise of the defendant's title, the more so as it may be admitted, and was indeed admitted by the defendant's vakeels in the course of the argument, that the defendant was not such a son as would have any title to succeed to the Raj, if the late Rajah had left any son by his regular wives, or even if the late Rajah had adopted a son. The defendant is a son by a wife of a lower caste than that of the late Rajah; and the sons of such wives admittedly

rank below and after the sons by wives of the same caste as the Rajah. It may even be admitted still further that, in the usual course of things, the Rajah would probably have adopted a son, if he was satisfied that he would not have issue by the wives of his own caste; and it is probable, looking to antecedents in former cases of adoption, that, if the Rajah had adopted a son, he would not, in all probability, have adopted a son from the family of the Rajah of Mohurbhunj to which the alleged adopted son Bindabun Chunder belongs; and it is quite possible that the Rajah may even have made some overtures, to that effect as is stated in the evidence, as it is shewn that he had already married four wives and had no children by any of them. But the question as to whether the adoption of Bindabun Chunder took place, would still be an open question; and it is to this question that attention must first be given.

As usual in this country, there is no lack of direct evidence to prove the adoption. It is impressed upon us that this evidence consists of the depositions of several of the principal officers of the Raj of Keonghur, as well as of the Raj of Mohurbhunj, and also of independent witnesses unconnected with either Raj; and that it is supported by the statements of the widow of the late Rajah; and that it is further corroborated by the *unoomotee putro*, or letter of the late Rajah; alleged to have been written on the day of his death to his widow, in which he informs her of the adoption having taken place and desires her to give effect to it.

It is on the other hand contended that this letter to the Ranee is a forgery; that it was not written by the orders of the Rajah or before his death, but has been subsequently concocted by the Mohurbhunj Rajah; in order to support the title of his nephew. And in proof of this, defendant's vakeels point to the fact that the letter, though dated the 11th Choitro 1268, corresponding to March, was not publicly put forward until the month of June. While, on the other hand, they shew that another letter from the late Rajah, also dated on the 11th Choitro, was posted on the 12th Choitro at the regular Post Office near Tribeni and addressed to the Superintendent of the Tributary Mehals, in which the Rajah, alluding to his approaching death, distinctly intimates that his son, Dhunonjoy Bhunj, the defendant, is the legal successor to the Raj. This letter was received in the usual course of the Post. It was followed by another, dated the 12th Choitro, containing an *urzee* from two chuprassees belonging to the Establishment of the Superintendent of the Tributary Mehals, who had been appointed to accompany the Rajah to Tribeni, in which allusion is made to the letter of the previous day and to the dying expressions of the late Rajah in favor of his son Dhunonjoy Bhunj. This letter was posted on the same day on which it is said to be written, and also reached in usual course. It is very important to determine which of the two letters of the 11th Choitro is the genuine letter of the Rajah. If that put forward by the defendant was written by the Rajah, there is an end of the adoption. It is impossible that if the Rajah had, as is alleged, formally adopted the minor Bindabun Chunder at Balasore on his road to Tribeni, he would have, on his death-bed at Tribeni, a few days after, made no allusion to that adoption but set up Dhunonjoy Bhunj as his successor. The case for the plaintiff is that this letter as well as the *urzee* of the chuprassees was a fraud and conspiracy concocted in order to defeat the rights of Bindabun Chunder by the Dewan of the late Rajah called the Bebarta Chunder Seekur Roy Mohaputtur, who by setting up a claim in favor of Dhunonjoy, wished to obtain the management of the Raj in his own hands, and thereby to secure his own advantage and profit. It is said that in furtherance of this conspiracy, he despatched these two letters of the 11th and 12th from Tribeni duly registered and making the best of his way back, first visited the Maharajah of Mohurbhunj before whom he made no allusion to the letters but admitted that Bindabun Chunder was the rightful successor to the Raj; and that he then returned to Keonghur and openly set up the minor Dhunonjoy on the Guddee in defiance of the wishes of the Ranee and the officers of the Raj, and in direct contravention of the orders of the Superintendent of the Tributary Mehals, who repeatedly directed him to appear with Dhunonjoy Bhunj at Cuttack, and there await the orders of the Superintendent.

We have given all the circumstances of the case our most careful consideration, and are not satisfied that the Bebarta in any of these proceedings acted dishonestly. It does not appear that he had any reason for subserving the interests of the minor Dhunonjoy, in reference to those of Bindabun Chunder. The former was not a person of any rank or influence, while the latter was supported by the whole power of the Mohur-

bhunj Rajah, the most influential of all the Rajahs of the Tributary Mehals. It is impossible that there could have been any conspiracy between Dhunonjoy who was a boy, and the Bebarta who was the head and most trusted servant of the Rajah, before the Rajah went to Tribeni. It is in the highest degree impossible that, if an adoption of Bindabun Chunder, the nephew of the Rajah of Mohurbhunj, had been openly celebrated in the Sudder station of Balasore on the way to Tribeni, the Bebarta would have attempted rough-handed with the help of only two chuprassees to have such an adoption set aside. It does not appear that the Bebarta in any way bettered his own position by putting forward Dhunonjoy as heir in preference to Bindabun Chunder, as in both cases he would have been the manager of the minor's interests in the Raj. In the *unoomutee putro* letter of the 11th Choitro, put forward in favor of Bindabun Chunder, this Bebarta is appointed his manager. Then again it is equally improbable that, if the Bebarta had laid this deep conspiracy, he would immediately on his return to his country, proceed to the residence of the Rajah of Mohurbhunj. It must by that time have been fully known in Keonghur, and we have no doubt in Mohurbhunj also, that the Rajah was dead, and that letters had been received from him declaring Dhunonjoy to be his legal heir to the Raj. It is asserted that this was not known at Mohurbhunj, and that the Bebarta, knowing that it was not known went to Mohurbhunj, concealing his wickedness, and with the view of blinding the Rajah admitted the right of Bindabun Chunder as heir. But it is difficult to see what advantage he gained thereby in the prosecution of his views in favor of Dhunonjoy, while it is very clear that he ran a great risk in thus placing himself in the hands of his powerful enemy against whom he was conspiring. It is clear, too, that letters had been sent to the Ranee at Keonghur informing her of the Rajah's death, and there was consequently every probability that the news would have reached also to the Mohurbhunj Rajah long before the Bebarta arrived. It is proved, upon the evidence, that the Bebarta did not make any undue haste to reach Mohurbhunj; but that he even remained behind at Midnapore, while others of the party, who had accompanied the Keonghur Rajah to Tribeni, preceded him to Mohurbhunj. This delay was not what might be expected from a person who was anxious to see the Mohurbhunj Rajah before the contents of the letters in favor of Dhunonjoy had been made known to the Rajah. Looking then to the probabilities of the case, it seems to us that the line of conduct, which it is said that the Bebarta adopted, was not one in which he favored his own interests, or such as might be expected from a person engaged in a plot against the family of the Rajah of Mohurbhunj. It is still less likely that the Superintendent's chuprassees would have assisted the Bebarta in any such plot. But it is then said, how can the *unoomutee putro* letter of the 11th Choitro be accounted for? It is not denied that it bears the seal of the late Rajah of Keonghur; and as that seal remained with the Bebarta, it was impossible for the Rajah of Mohurbhunj to have obtained possession of it. There is, of course, no evidence upon which this letter can be explained. The first mention which is made of any letter, is in an *urzee* from the Maharajah of Mohurbhunj dated the 24th Choitro. In this, the Rajah states that the Bebarta had reached Mohurbhunj the preceding day, and mentions in general terms that the Ranee had received a letter. In this also the first mention is made of the adoption of Bindabun Chunder. But the letter of the late Rajah itself, though dated in March, was not forwarded to the Superintendent of the Tributary Mehals by the Ranee until the month of July. The delay in putting forward this letter is the most suspicious fact connected with it. There seems to be no doubt that the alleged adoption had not been reported to the Superintendent of the Tributary Mehals. Indeed, it is admitted that the Ranee herself was ignorant of the adoption until she received this letter from the late Rajah. No other letter of the Rajah's is put forward in which any communication on the subject was made to her; still on this important subject as to who was to succeed to the Raj, the Ranee delays for two months to put before the proper authorities this important evidence in behalf of the adopted son, and this delay is the more extraordinary as it is evident from her own previous letters that claims to the Raj were being preferred on behalf of Dhunonjoy, even if Dhunonjoy had not been actually seated on the guddee. There is evidence, indeed, to show that the Ranee had, in accordance with letters received from the late Rajah, herself assisted in placing Dhunonjoy upon the guddee. The delay in sending the alleged *unoomotee putro* letter of the 11th Choitro, is accounted for on the supposition that some time was required to concoct it between the Ranee and

the Mohurbhunj Rajah. And looking to the conduct of the Bebarta about this time, it appears to us that even he was not unwilling at that time to carry out the wishes of the Rajah of Mohurbhunj; and it is quite possible that the seal of the late Rajah, which is affixed to the *unoomotee putro*, was obtained from him. The vakeels of the plaintiff assert that the whole conduct of the Bebarta proves that he was from the date of the Keonghur Rajah's death hostile to the interests of Bindabun Chunder. But it appears to us that the only hostile action is that which he took before he was aware that any claim was to be set up for Bindabun Chunder. His going to Mohurbhunj shews that he then supposed that he was on friendly terms with the Rajah of that place. His letter of the 2nd Bysack, it is not easy to explain, in which he asserts that the Ranee wished to put forward the title of another member of the Mohurbhunj Rajah's family, named Kishen Chand. But his subsequent delay in obeying the orders of the Superintendent of the Tributary Mehals, and not appearing before him with Dhunonjoy Bhunj as directed, is not consistent with any plot or conspiracy against the Mohurbhunj Rajah, and it was not subservient to thei nterests of Dhunonjoy.

Looking now to the direct evidence in favor of the adoption, it is to the purport that the Rajah of Mohurbhunj had proceeded to Balasore, at the request of the Superintendent of the Tributary Mehals, to receive a *khillát* given by the Government in return for his good services during the mutinies; that the Rajah of Keonghur happening accidentally to be there on his way to Tribeni, the Superintendent of the Tributary Mehals asked him to remain, and be present at the ceremony of investiture of the *khillát*; both the Rajahs were in frequent communication with the Superintendent during the days that they remained at Balasore. It is said that, on the day before the Keonghur Rajah left, the adoption of Bindabun Chunder took place. It appears to us that had there been any adoption, the fact must have been then and there communicated to the Superintendent. In a matter of such vital importance as an adoption, official notice of which would, under any circumstances, have most probably been sent to the Superintendent, it is inexplicable why no notice was given to him by either of the Rajahs, although both were in constant daily intercourse with him. It is said that the Superintendent's evidence has not been taken, and that it is, therefore, not certain that he was not informed of it. But there is nothing in the evidence of all the witnesses to shew that he ever was informed of it; and it may be taken for granted that the plaintiff would not have omitted to call so important a witness had any such information been given to him. It is said that the notice to him was not necessary. However this may be, looking to the attendant circumstances, the fact that no such notice was given to the Superintendent leads us to discredit the evidence put forward to prove the adoption. It does not appear also that the Rajah had reached that stage of life in which he could consider it incumbent upon him to make an adoption. He had certainly married four wives of his own caste and had no children by them. But it is certain that he had had children by other wives of a lower caste; and it is proved that he was still contracting new marriages with wives of his own caste, by whom he might fairly expect to have children.

Whether we look to the circumstances attendant on the alleged adoption at Balasore, or the silence of the two Rajahs on the adoption at that station, the conduct of the Ranee of Keonghur subsequent to the death of the late Rajah, or the action taken by the Bebarta after the Rajah's death, we are not satisfied that the adoption ever took place, and we do not credit the allegation that the Bebarta was the head of a conspiracy acting against the interests of the Mohurbhunj Rajah.

It is unnecessary that we should, under these circumstances, enquire in any way into the defendant's title. The plaintiff having failed to prove that the adoption took place, the Superintendent of Tributary Mehals was right in dismissing the plaintiff's suit, and we also dismiss this appeal with costs.

The 16th March 1865.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Limitation (Suit for damages to recover personal property plundered)—Special appeal (measure of damages).

Case No. 1493 of 1864.

Special Appeal from a decision passed by Mr. E. S. Pearson, Judge of Tirhoot, dated the 5th April 1864, *affirming a*

decision passed by Moulvie Syed Emdad Ali Khan, Principal Sudder Ameen of that District, dated the 3rd September, 1863.

Sheikh Ahmedoolla (Defendant), *Appellant,*

versus

Hur Churn Pandah and others (Plaintiffs), *Respondents.*

Mr. J. Baptist and *Moonshee Ameer Ali* for Appellant.

Baboo Luckhee Churn Bose for Respondents.

A suit for damages to recover the value of personal property plundered and other consequential damages, is governed by the limitation prescribed by Clause 16 Section 1 Act XIV of 1859.

The objection as to the measure of damages assessed by the Lower Appellate Court, is not admissible in special appeal.

THIS is a suit for damages on account of property which had been plundered by the defendants, for which act they had been punished under the Criminal law.

The LowerC ourts gave plaintiff a decree.

Defendant now appeals specially, urging that the present is a suit for damages for injury to personal property, and, therefore, should have been brought within one year from the time the cause of action arose.

We are clearly of opinion that a suit for damages to recover the value of personal property plundered and other consequent damages is in no sense a suit for damages on account of injury to personal property within the meaning of Clause 2 Section 2 of Act XIV of 1859. The cases of Saduk Mundul *vs.* R. Watson & Co., and Jugobundoo Dutt *versus* Maseyk, decided by this Court severally on the 26th August 1863, and the 22nd February 1864, clearly establish this point, and lay down that the period of limitation applicable to suits of this nature is six years as mentioned in Clause 16 of Section 1 of Act XIV of 1859, no other limitation being expressly provided for them by that Act. The other point taken up by special appellant, as to the measure of damages assessed by the Judge, is not one admissible in special appeal. We, therefore, reject this special appeal with costs.

The 17th March 1865.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Suit for possession (by lakherajdar).

Special Appeals from a decision passed by Mr. J. R. Muspratt, Judge of Purneah, dated the 11th July 1864, *affirming a decision passed by Moulvie Abdool Rubh, Officiating Principal Sudder Ameen of that District, dated the 30th September* 1863.

Case No. 2848 of 1864.

Bibee Reazoonissa (Defendant), *Appellant,*

versus

Sheikh Hossein Buksh and others (Plaintiffs), *Respondents.*

Mr. R. T. Allan and *Baboo Sreenath Doss* for Appellant.

Baboos Kishen Kishore Ghose, Greeja Sunker Mojoomdar, and *Kedarnath Mojoomdar* for Respondents.

Case No. 2849 of 1864.

Bibee Reazoonissa (Plaintiff), *Appellant,*

versus

Motee Singh and others (Defendants), *Respondents.*

Mr. R. T. Allan and *Baboo Sreenath Doss* for Appellant.

Baboos Kishen Kishore Ghose, Greeja Sunker Mojoomdar, and *Kedarnath Mojoomdar,* for Respondents.

A person suing as lakherajdar for possession of land of which he has been dispossessed by the zemindar, is not entitled to a decree merely on the ground of his possession after the resumption proceedings, but on proof of possession several years before resumption.

THE plaintiff in these cases, as lakherajdar, sued for possession of certain lands of which he has been always in possession and of which he has been dispossessed by the zemindar, defendant.

The zemindar pleads that the lands are his mál lands; that the plaintiff, after resumption got possession of them fraudulently for some years; but that he is now in possession, and plaintiff's present claim should be dismissed.

The first Court found that the lands claimed had for a long time been in possession of the plaintiff as a portion of his lakheraj estate, and that defendant dispossessed him illegally of the same. The Principal Sudder Ameen, therefore, gave plaintiff a decree.

The Judge, on appeal, simply found that the plaintiff was in possession, and that the defendant illegally dispossessed him. He, therefore, upheld the Lower Court's judgment.

The defendant, the zemindar, now appeals specially, urging that the finding of the Judge is insufficient; that he merely finds

that they were in possession after the resumption proceedings, which is admitted by him, but which is quite insufficient to entitle him to a decree.

We think that the Judge should have found, as has the Principal Sudder Ameen, whether the plaintiff has for a long series of years, before resumption that is, been in possession of the land as lakherajdar or not; if he clearly proves this, he is clearly entitled to possession under his title, the validity of which may hereafter, at the suit of the zemindar, if the tenure be one of a nature warranting such a step on his part, be enquired into; but the finding of possession of the plaintiff after resumption alone is clearly insufficient. We, therefore, remit the case for a clear finding as above suggested.

The 17th March 1865.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Suit for khas possession—Declaration of right to receive rent from admitted tenants.

Case No. 2044 of 1864.

Special Appeal from a decision passed by Mr. G. C. Fletcher, Judge of West Burdwan, dated the 29th April 1864, *reversing a decision passed by Baboo Banee Madhub Shome, Principal Sudder Ameen of that District, dated the 21st January* 1862.

Gopee Mohun Gossain (Plaintiff,) *Appellant,*

versus

Issur Chunder Banerjee and others (Defendants), *Respondents.*

Baboo Nilmadhub Sein for Appellant.

Baboos Obhoy Churn Bose and *Bungshee Dhur Sein* for Respondents.

A person, whose suit for khas possession is dismissed, is not entitled to a declaration of his right to receive possession of the proprietary title, *i. e.*, to receive rent, from those who admit tenancy.

THIS was a suit for khas possession of a property purchased in execution of a decree. Certain claimants set up a title—some under a deed of gift, some under a mokurruree lease, and some under deeds of sale. These claims were found to be valid, and the suit for khas possession was dismissed. The Court of first instance, however, extra-judicially ruled that the plaintiff would be entitled to receive possession of the proprietary title, or, in other words, that he might receive rent, from those who admit tenancy.

The Judge reversed this portion of the decision of the Lower Court, and we think he was right in so doing. The plaintiff sued for khas possession, and his suit must be decided upon the ground upon which he based it. A decision of the late Sudder Court, dated 11th August 1857, Kalee Sunker Bhuttacharjee, is in point. Appeal dismissed with costs and interest.

The 20th March 1865.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Appellate Court (Powers of)—Time for filing documents (Enlargement of, by Court of first instance)—Evidence (Copies of documents).

Case No. 1824 of 1864.

Special Appeal from a decision passed by Mr. W. H. Brodhurst, Judge of Sarun, dated the 29th March 1864, *reversing a decision passed by Moulvie Itrut Hossein Khan, Principal Sudder Ameen of that District, dated the 25th April* 1863.

Gour Surun Doss (Plaintiff), *Appellant,*

versus

Kanhya Singh (Defendant), *Respondent.*

Mr. R. T. Allan, Moonshee Ameer Ali, and *Baboo Kishen Succa Mookerjee* for Appellant.

Baboos Grish Chunder Ghose and *Kalee Mohun Doss,* and *Moulvie Syud Murhumut Hossein* for Respondent.

An Appellate Court has no power to interfere with an order of a Court of first instance enlarging the time for filling documents.

Authenticated copies of documents, of which the originals are filed in another suit, are admissible in evidence when not objected to by the other side.

THE special appellant in this case (plaintiff in the Court below) sues, as purchaser of the equity of redemption of certain villages, to release the mortgaged property, on payment of the sums advanced by the mortgagee. His statement is that Gholam Nuzzuff Khan, the original owner, mortgaged, on 24th September 1804, an 8 annas share in mouzah Russoolpore, the entire mouzah of Mahomedpore, with another mouzah called Hakkooum, to one Bhugwan Koer, who, on his part and on the same day, executed an "ekrar" or agreement, binding himself to release the lands on payment of the monies advanced.

Both these documents where duly registered first by the Cazee, and afterwards by the Register of Deeds.

On the 24th February 1807, another deed of conditional sale was executed between the same parties on account of mouzah Sootea; and in the same month in the year 1807, the two mortgage deeds were consolidated, and a fresh deed drawn up in favor of the son of the original mortgagee, Gunga Gobind.

In a word, the proprietor Gholam Nuzzuff Ali received altogether advances to the amount of rupees 4,235, for which he executed deeds of mortgage on the three abovementioned mouzahs, the two last acknowledgments being dated 7th September 1808 and 9th March 1810.

The question in dispute is whether these conveyances were simple mortgages or absolute sales.

In support of the latter position, it is contended that, in an execution of decree case, the property now in suit was attached as belonging to Gunga Gobind; and although Mohun Singh the father of the defendant, filed the ekrarnamahs of 1810, and the two zur-i-peshgee leases of 1820 and 1833, and other documents to show that the judgment-debtor had no absolute right in the lands and had sold his rights as mortgagee to him (Mohun Singh), and although the representative of Gholam Nuzzuff Ali, the original proprietor, likewise objected, the sale was allowed to proceed, and Gunga Gobind's rights and interests in the property were disposed of.

To prove that the sales made by Gholam Nuzzuff Ali were conditional and not absolute, the special appellant filed copies of the ekrars of 1804 and 1809. The first Court received them in evidence, and held that the conveyances to Bhugwan Koer were mortgages only and not out-and-out sales.

But the Judge, although no objection was taken by the other side, considered *first*, that these documents had not been filed in proper time, and *secondly*, that being copies they were not receivable in evidence. He decided, therefore, that there was no reliable evidence as to the nature of the sales, and as plaintiff had failed to make out his case, dismissed the suit, reversing the orders of the Principal Sudder Ameen.

It is urged in special appeal:—

(1). That the Judge was wrong in refusing to receive these copies. And,

(2). That the decision of 1837 had nothing to do with these documents, and did not invalidate them.

With regard to the *first* objection, we think that the Judge was wrong. The Court of first instance was fully justified in enlarging the time for filing the documents, if it so pleased; and the Judge had no power to interfere with such an order. The objection that the copies were not receivable, was not taken by the other side either in the original case, or in the grounds of appeal to the Judge, and the special appellant had, therefore, no opportunity given him to explain the reason why the originals were not forthcoming. It appears, moreover, from the record, that the originals were in existence, but being filed in another suit by Mohun Singh, could not be given to the special appellant. This explanation would, of course, have been satisfactory; and it appears to us unjust to deprive the special appellant of the benefit of it, and to take him by surprise, as the Judge has done, by refusing the copies, without any objection being taken to them by the other side. We observe, moreover, that these copies came from their proper custodian, the Register of Deeds, and were duly and properly authenticated.

With regard to the *second* objection, if it can be shewn that the ekrarnamahs in question have ever been declared spurious by any competent Court, *cadit quæstio*, the matter is at an end. But what are the facts? The decision referred to finds that the ekrar given by Gunga Gobind was worthless, not because there was any denial at that time that the sale was conditional, but because, at the date of giving it, Gunga Gobind was a minor, and because there were evident traces of collusion.

But supposing even for the sake of argument, that Gunga Gobind's ekrar had been set aside in that decision on other grounds, why should that decision affect the present case? The ekrars which the Judge has refused are not the ones executed by Gunga Gobind, but others given by his father Bhugwan Koer on the occasion of the first conveyance, and the object of them is to show the nature of the original agreement between the parties.

We think, therefore, that the case should be remanded in order that the Judge may either receive in evidence the copies of the ekrars filed, or send for the originals which the Mohafiz's report shows to be in the office, and decide the question of absolute or conditional sale with reference to them.

Costs will follow the result.

The Weekly Reporter,

APPELLATE HIGH COURT.

No. 13.] APRIL, 1865. [Vol. II.

The 20th March 1865.

Present :

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Suit for possession of resumed lands—Resumption Law and Procedure—Application for settlement—Grants of waste lands in the Sunderbunds by specified boundaries.

Case No. 81 of 1864.

Regular Appeal from a decision passed by Mr. W. B. Buckle, Judge of Backergunge, dated the 24th December 1863.

Khaja Abdool Gunny and others (Plaintiffs), *Appellants,*

versus

The Commissioner of the Sunderbunds.

Messrs. R. V. Doyne, R. T. Allan, G. Plowden, and *C. Gregory* for Appellant.

Baboo Kishen Kishore Ghose for Respondent.

Where, in a suit for possession of resumed lands, the plaintiff contends that the laws under which the lands in dispute were resumed (Regulations II of 1819 and III of 1828) contemplate assessment and not ejectment, the plaintiff must prove that he had formally applied for, and been refused, a settlement of the lands.

Where a potta granted by the Revenue Authorities for the reclamation of waste lands in the Sunderbunds gives away the lands by specified boundaries, the Court is bound to award to the grantee all the lands within such boundaries, if they can only be fixed and identified.

THIS is a suit for possession of two chuks of land stated to be within the talookdaree potta of the plaintiffs as conferred on them by Government in 1805. The grant of the pottah itself is not disputed, but that the proceedings of the various Revenue Authorities, who, from time to time, have taken up this case, are very long and intricate, and in some instances the opinions are conflicting. It will be expedient presently to give a short history of the same; but it is necessary for the sake of perspicuity to refer to another case decided by another Bench of our High Court on the 11th of May 1863, and relating to a similar dispute between the same parties for lands in this very locality, the decision in which is mainly governed by the same past history and the same potta.

The Revenue Authorities, it seems, after taking up the whole question at various intervals, ended by laying hands in 1845 on no less than 7 chuks in the possession of the plaintiffs. One of these, known as chuk Phoolgaria, they have now released. Three more, known as Nos. 5, 6 and 7, they then resumed; and the rest, or three in all, they reserved for further and more detailed enquiry—these latter chuks are known as Nos. 2, 3 and 4. The suit for the reversal of the resumption of the former chuks Nos. 5, 6 and 7 brought by the plaintiffs, was decided adversely to them in the first Court by Mr. Kemp, when Judge of Backergunge, on the 20th November 1860; and the decision was affirmed by a Bench of the High Court (Justices Bayley and G. Campbell) on the 11th of May 1863. Both these decisions have been referred to and commented on in the course of argument as throwing light on past transactions between the plaintiff and Government, and as having an immediate connection with the present suit. We need only here say, however, that we find the suit before us to be one which can be decided on its own merits; and we are quite certain that

it is possible to arrive at a decision either similar or opposed to that arrived at in the former case, for reasons wholly independent, and in the latter contingency without in the least clashing with the said decision of May 1863.

Potta of 17th of April 1805.
Petition of Ram Dhun Chatterjee.
Report of Naib of Pergunnah of 18th February 1805.
Report of Mr. Battye, the Collector, dated 18th March 1805.
Proceeding of Mr. Dampier, Commissioner of the Sunderbuns, 15th March 1830.
Proceeding of Special Commissioner, 14th May 1830.
Ditto ditto, 24th August 1830.
Proceeding of Mr. Dampier, 19th August 1831.
Ditto, Special Commissioner, 31st January 1833.
Ditto of Mr. Sturt, Collector, 19th May 1845.
Ditto of ditto, 21st August 1845.
Ditto of Special Commissioner, 17th September 1845.
Ditto of Commissioner of Sunderbuns, Baboo Umakant Sein, dated 6th March 1849.
Ditto of the Revenue Commissioner, Mr. Harvey, 1st September 1849.
Ditto of Deputy Collector, Mr. Smith, 11th March 1853.
Ditto of Commissioner of Sunderbuns, 12th December 1854.
Ditto of Mr. Grote, Revenue Commissioner of 12th July 1856.
Ditto of Commissioner of Sunderbuns, Mr. Reily of 6th of September 1860.
Ditto of ditto, March 1861.
Proceeding of Revenue Commissioner, Mr. Lushington, 10th April 1861.
Map of Rennell, Map of Lieut. Hodges, Map of Mr. Sturt, Collector, Map of Mr. Mullens, Surveyor, Map of Revenue Survey, 1862-63. Map of Mr. Gomes.

The documents which have been referred to in this case, and which are the common ground of both parties from which they draw opposite conclusions, are noted in the margin.

It seems that the potta of 1805 gave to the plaintiffs out of the Government property apart, and excepted from the talook of Buzurgumedpore two chuks in the Sunderbund jungle known as Phoolgaria and Ailah Teorkhalie of which the boundaries are described as follow:—

Ailah Teorkhalie.

North and East. The Ailah Dhone.

South. The Parua River.

West. Bhyang River flowing ebb-wise as far as the Khag Dhone, or the Bhatti, *i. e.*, the ebb of the Bhyang as far as the Khag Dhone.

Phoolgaria.

North. Dhone of Phoolgaria.

West. The Bishkhalie River.

South and East. The Khag Dhone.

This chuk Phoolgaria so described has been released by Government, as one of the precise identification and boundaries of which there could be no contention or doubt.

With regard to Ailah Teorkhalie, it seems that the plaintiffs now claim, under its boundaries, the plots which in the small lithographed map before us are geographically described as Nos. 2, 3 and 4; of these again, No. 3 now described by the Government officers as Ailah Teorkhalie, has been released to the plaintiffs, though more as a matter of favor than of positive right, while the great contention, and indeed, the main question before us is whether the plaintiffs have established their right to plots Nos. 2 and 4, of which the latter is designated as Bonessur, and the former is now marked in the map as Kourabunia.

We have heard Mr. Doyne very fully on the merits for the appellant, and we have heard Kishen Kishore for Government in reply; but, before going into the facts really in dispute, we think it necessary briefly to dispose of certain arguments in the law which were raised by Mr. Allan for the appellant, after the whole facts had been expounded and commented on by Mr. Doyne.

Mr. Allan argued, *first*, that the laws under which these chucks had been resumed, Regulations II of 1819 and III of 1828, contemplated assessment and not ejectment; and that the latter, and not the former process had been followed in this case. *Secondly*, that the lands were part of Buzurgumedpore, a talook purchased by Government, and that they were not a part of he Sunderbunds at all. In this view of the case, Government, it was argued, had only the rights which any other auction-purchaser, zemindar, would have, and had no claim to put the Resumption laws in force. *Thirdly*, that the Resumption laws do not apply at all, even supposing the lands to be Sunderbund property, inasmuch as the strict procedure had not been followed, and without this the Resumption laws could not legally be put in force. *Fourthly*, that if the 2nd and 3rd points were correct, it would follow incontestibly that the *onus* of commencing and proving a case would be on the Government, as on any other plaintiff; and that the appellant would have a right to be replaced in the possession of the chuks, which possession he never ought to have lost, until dispossessed by the superior title of a plaintiff who had sued formally, and had proved his case like any other claimant.

With regard to the first point, we have only to say that there is nothing to shew us that the plaintiff has ever applied for the settlement of the chuks in dispute, and has met with a refusal. Some one, no doubt, is collecting khas on behalf of Government, but that does not prove that a formal application made by the plaintiff would not have been favorably entertained.

With regard to the second and third points, we observed that they are urged at a very late stage of the proceedings, and that they were not laid before the Judge of the Lower

Court at all. But the truth is that these lands, by all the maps, are clearly within the Sunderbunds, and have been invariably treated as such in all the proceedings by all the authorities. The language of the pottah, moreover, seems clear to us as separating and distinguishing these lands from the talook of Buzurgumedpore. The proceedings of Mr. Sturt, which are really the foundation of the present suit, and of the other authorities who succeeded to him, have been conducted with apparent regularity, and we have no doubt that, had this point been properly urged in the Court below, the Government would have shown incontestibly that all the requirements of Resumption law and procedure had been fully satisfied.

In this view of the legal points, the fourth point need not be decided, as it does not arise on the failure of the other three.

We now come to the merits of the case, and we find Mr. Doyne's contention to be, first, that the lands were regularly and formally released by Mr. Dampier, the Commissioner of the Sunderbunds in 1830-31, and that, consequently, the plaintiff should not have been further molested and disturbed in his possession thereof; and next that, even if the lands cannot be shown to have been so released, they lie within the boundaries of the chuk granted by the pottah of 1805 as Ailah Teorkhalie, and should be released.

With regard to the first point, we have been unable, after much consideration, completely to satisfy ourselves that Mr. Dampier did knowingly and avowedly release the lands marked as chuks 2 and 4.

Passing over the earlier proceedings of 1805 on which nothing very material arises, we find that Mr. Dampier in 1830 was for resuming these lands, as the plaintiffs foolishly withheld their pottah from some cause which we are now unable to discover; but that, on the production of this document, and after receiving a proceeding drawn up by Mr. Walpole, the Special Commissioner, Mr. Dampier came to the conclusion that, though some deception might have been practised by the original grantee on the Collector in 1805, yet as the grant was genuine, formal, and regular, and the disputed chuk was within the boundaries of the pottah, the claim ought to be foregone.

This order was approved by the Special Commissioner, but there was evidently no determination of the area or site of the boundaries, and no solution of the real point, whether any land was held by the plaintiffs in excess of their grant or without their boundaries. This, however, is the real gist of the dispute.

Matters remained in this state until May 1845, when Mr. Sturt went to the spot, sailed round the chuks in question, and directed resumption proceedings to be instituted against no less than 7 chuks.

The Special Commissioner on the 16th of September 1845 directed further enquiries to be made, and these do not appear to have been instituted until March 1849, when the Commissioner of the Sunderbunds, Baboo Umakaunt Sein, took up the matter, and, after a recital of past proceedings, declared the suits to be untenable, and would have struck them off.

Mr. Harvey, the Revenue Commissioner, disapproved of this view of matters, and the case came in appeal before the Special Commissioner, Mr. Mills, who deemed it essential that an enquiry should be made *as to whether these lands fell within the pottah*, inasmuch as if they did, and if they had been released by Mr. Dampier, no resumption and assessment would be justified, while *vice versâ* resumption would be correct.

Then followed an investigation on the spot by Mr. Smith, the Deputy Collector; and after this the Commissioner of the Sunderbunds, it is to be observed, was inclined to release No. 2 which has since been resumed. The matter, however, came before Mr. Grote who, on the 12th of July 1856, reviewed the whole history of the case, and the enquiry by Mr. Smith, and ended by requiring further information before he could decide either on resumption or a release.

This was at last effected by Mr. Reily, the Commissioner of the Sunderbunds, on the 6th of December 1860, and he resumed the lands, his proceedings being briefly approved of by the Revenue Commissoner on the 10th of April 1861.

It is now necessary to see whether these final proceedings can stand, whether the Judge's decision substantially agreeing with them is correct, or whether the appellant has made out his case for reversal by showing the land to be within the boundaries of his pottah.

We think, as before observed, that the proceedings of Mr. Dampier are not sufficiently clear and precise to warrant us in saying that the boundaries were identified at that time, and that all the lands now taken ought on that ground to be released.

But we are clear, on the other hand, that the Judge's decision does not rest on good

foundations, and we are quite satisfied that the boundaries have been so made out before us as to fully warrant us in carrying out the intention of the grant and in giving the appellant his decree.

In the first place, we can have no sort of doubt as to the position of three out of four of the boundaries laid down in the potta and since shown by the various maps. The Northern and Eastern boundaries are the Ailah Dhone which is marked in all the maps; and that the Southern boundary is the Parua or Bonessur river, there can be no question, and it is equally certain that the same can be and has been satisfactorily identified. The Southern boundary drawn by the Judge is avowedly not the Parua. It is a purely arbitrary line drawn so as to meet what the Judge has taken to be the Western boundary, and to support the Judge's own conclusion on this head. In fact, there is much point in Mr. Doyne's argument that, because the Judge, like other persons who have taken up this enquiry, had some difficulty in making out the Western boundary which was not clear, he deprived the plaintiff of the Southern boundary which was and is perfectly clear.

The identity of the Parua and Bonessur is shown by the proceedings of Mr. Sturt, who came down that river in 1845. This same conclusion is admitted also by Mr. Reily even when he resumed these lands. The position of the Parua, as the Southern boundary, was fixed by Mr. Kemp in his decision in the other case, and this conclusion was accepted by the High Court in the appeal. The position of the said river, with the peculiar land which makes it the Southern boundary of what was given by the potta of 1805, is capable of identification in all the maps, in the Persian Map of Mr. Sturt, in the Map of Mr. Mullens, and in the Survey Map of Colonel Gastrell, in which latter the river, though marked as the Bonessur, must still be considered to bear the name of the Parua from the proceedings of officials who, while adverse to the plaintiffs, have yet admitted and recorded this fact.

This being so, and the three boundaries of the chuk being shown incontestibly, it remains for us to ascertain the position of the 4th or Western boundary. Here it is fully admitted on all sides that a difficulty arises in the identification of this boundary.

The Western boundary has, we have seen, been curiously described as the Bhatti or ebb of the Bhyang as far as the Khag Dhone. Now there is no documentary evidence of any kind to shew us where any Bhyang river or khal flows. There is a place called Bhyang to the north of the spot in dispute, and we should naturally look for a khal of this name somewhere in the same locality or direction, while there is oral evidence to show that the right or Northern bank of the Ailah Dhone is sometimes called the Bhyang. We need only say that we think this not improbable. But another difficulty arises in the fact that the Eastern boundary of the chuk Phoolgaria is admittedly the Khag Dhone. Why, it is pertinently argued for the respondent, if this same Dhone were to have been fixed as the Western boundary of the Ailah Teorkhalee, and the 2 chuks were to be coterminous, was this not so stated in the potta? Why should resort have been made to another river very oddly described, and difficult to find, when by simply mentioning Khag Dhone as the Eastern boundary of one chuk, and as the Western boundary of the other, all doubt and difficulty would have been at once removed?

The answer to this must be that in 1805 we may suppose the different creeks and rivers in the Sunderbunds to have not been very fully and accurately known. After all the Khag Dhone, and the ebb-flow of the Bhyang as far as the Khag Dhone, may have been two ways of describing the same boundary, and, as such, we must be content to take them. And whatever difficulty or inconsistency there may be in our thus assenting to the appellant's view of the matter, such difficulty and inconsistency would be much increased if we adopted the view of Government. The khal or nullah taken by the Judge as the Western boundary is a small khal described in the map of the Survey as in part excavated by labor and not a natural stream. But not to lay stress on the assertion of any excavation of the khal, it is most unlikely that such a small khal, even if in existence or known to be in existence in 1805, would have been taken as the fourth boundary, while the remaining three boundaries are large and apparently navigable rivers. By fixing this Kourabunia khal, as it is called, as the Western boundary, the Southern boundary is lost altogether; while, if the Southern boundary be extended to the Parua, so as to take in the chuk No. 4, then a comparatively small piece of land, between the Khag Dhone and this Kourabunia Khal would be taken away from the plaintiffs altogether. Yet the mere inspection of the set

and lay of the land, between two chuks in the midst of the Jungle regularly released to the plaintiff by Government already, would seem to countenance the plaintiff's contention that this other piece No. 2 now recovered would be what his predecessor in 1805 would be certain to ask for, and would be very likely to get.

We can lay no stress on any supposed fraud of the original grantee in 1805 or on any imputed ignorance of the Revenue Authorities at that time. The grant of the potta is unquestionable, and no one asserts that any boundaries have ever been inserted or changed. It may be possible that the Collector did not know the actual extent of the area which he was giving away; but as it is clear that he gave away the land by specified boundaries, a Court would be bound to award to him all the lands within such boundaries if they can only be fixed and identified.

It must be remembered too, that the object with which such grants are made is the cultivation and clearance of jungle lands in the Sunderbunds; and there can be no doubt, from the maps and reports, that this object has been kept in view by the grantees: for the record shows a gradually increasing cultivation, and we observe that Ailah Haut, which, it is not denied, owes its origin to the grantees, is situated at the north of the plot No. 2 which the Revenue Officers and the Lower Court have now denied to the plaintiff.

Some contention has arisen regarding the change of numbers of plots 2 and 3, which it is clear originated with the late Sunderbund Commissioner. After maturely considering this point, we are of opinion that the Commissioner was not justified in transposing the numbers of the plots, and in assigning the number 3 to Chuk Ailah Teorkhalee, and the number 2 to Chuk marked as Kourabunia.

We think too that, if there had been any difficulty in identifying the exact boundaries, the confusion has arisen partly from the acts of the servants of the Government; and we cannot say that these long, harassing, and repeated enquiries into the extent of the grant, which were so many times taken up, dropped, and then resumed without leading to a definite result, produce in our minds at all a satisfactory impression.

Looking then to the whole circumstances—to the position and set of the land, and to its by no means unnaturally falling within a grant asked for and conferred under the circumstances on record; to the full and unquestionable identfication of three of the boundaries, and to the comparative unimportance of the fourth; to the obvious inconsistency and injustice of the decision of the Lower Court which takes away one well known boundary, because the Court, as it well might have, had some doubt about another boundary not so well known; to the impossibility of satisfying or carrying out the terms of the potta by selecting any other line of demarcation; and to the obvious necessity for ending this dispute and for doing justice, if it can be done without violating all probabilities—we reverse the judgment of the Lower Court, and decree to the plaintiff the chuks marked as 2 and 4 with the Parua or Bonessur for the Southern boundary and with the Khag Dhone for the Western boundary. The boundary for some space to the West, must be the Khal termed the Burgonea which connects the Parua on the South with the Khag Dhone at or near the place where it trends to the West after flowing from North to South. But there can be no difficulty in this, inasmuch as the said chuk has been so marked out by the Revenue Authorities themselves.

Mesne profits will be ascertained in execution.

We have now only to add that this decision in our opinion in no way conflicts with the decision given by Justices Bayley and Campbell. On the countrary it is clear to us that in that case the plaintiffs unreasonably had taken and kept very much more than any boundaries would cover, and our award in the present appeal must not, therefore, be taken as at all inconsistent with the ruling of our colleagues on just the same documentary proofs, with which ruling, while decreeing this claim, we entirely concur.

Appeal decreed with costs.

The 23rd March 1865.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Finding (as to hereditary title)—Sufficiency of.

Case No. 2904 of 1864.

Special Appeal from a decision passed by the Judge of Patna, dated the 29th June 1864, reversing a decision passed by the

Sudder Ameen of that District, dated the 28th September 1863.

Thako Muhtoon (Plaintiff), *Appellant*,

versus

Ameerun and others (Defendants), *Respondents.*

Baboo Onoocool Chunder Mookerjee for Appellant.

Messrs. R. E. Twidale and *C. Gregory* and *Moulvie Murhumut Hossein* for Respondent.

A finding that the plaintiff is debarred from setting up a hereditary title (such finding being based on the absence of any claim by the plaintiff to that right on occasions when he might naturally have been expected to assert it, had he possessed it), was held to be a sufficient finding in law that the plaintiff possessed no kudeemee mourosee right.

THIS was a suit originally brought to recover possession of certain land, and the cancellation of an award under Act IV which had declared the defendant to be in possession.

The Court of first instance decreed in favor of the plaintiff, apparently on the ground that he had a fixed right of occupancy; and, on appeal, the Principal Sudder Ameen upheld the decision of that Court.

The defendants specially appealed to the High Court on two grounds:—

1*st.* That the Lower Courts had treated an alleged lease, pottah, from one Wusseebun to the plaintiff, and a suit for rent brought by Wusseebun against the plaintiff, as good and sufficient evidence of the right to possession, without enquiring either into Wusseebun's title, or the *bonâ fide* of the suit, although both were questioned by the defendants.

2*nd.* That the Lower Courts ought not to have found that the plaintiff was a kudeemee ryot, because he had, both in the Act IV case and in the suit for rent, represented himself as a ticcadar.

After hearing the special appeal, the High Court remanded the case to the Lower Appellate Court for a specific finding, as to whether or not the plaintiff was a kudeemee mourosee ryot, and also for specific answers to the defendant's original objections.

The Principal Sudder Ameen in his turn remanded this question to the Court of first instance, who again found that the plaintiff was entitled to possession, still leaving the nature of his right somewhat obscure. Against this decision the defendants appealed. The lower Appellate Court gave judgment in favor of the appellants, saying, amongst other things,—"I have no hesitation "in saying that the plaintiff is debarred "from setting up a hereditary title in lieu "of a title under a terminable lease pre- "viously pleaded. I must, therefore, re- "verse the decision of the Lower Court, and "decree the appeal."

The original plaintiff now specially appeals to this Court against this judgment. The point argued before us was that the Lower Appellate had not come to a finding on the question of kudeemee right at all, but had contented itself with saying that the plaintiff was debarred from setting it up. We think, however, taking the judgment of the Lower Appeal Court as a whole, that the Court has found that the plaintiff possesses no kudeemee mourosee right, and intends to base its judgment on the absence of any claim by the plaintiff to that right on occasions when he might naturally have been expected to assert it, had he possessed it. We cannot say that this finding is insufficient or incorrect in law.

The plaintiff then objects that the lower Courts have not investigated his lessor's title on the questions raised by the defendant; but as to this, we remark, that the finding of the Judge renders this unnecessary for either party, because as the alleged lease from Wusseebun had expired previously to the commencement of the suit, and the defendants were then and are in possession, the plaintiff could claim no right of action through his original lessor. He is a stranger to the land in every way unless he has a kudeemee right.

As we consider the finding of the Judge on the remand to be sufficient in law, we are now in a position to give the judgment of this Court on the original special appeal, as well as on this. Accordingly, we decree that the special appeal from the Judge on remand is dismissed with costs in both cases.

The 23rd March 1865.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Suit for possession by Heir during Widow's life-time.

Case No. 2901 of 1864.

Special Appeal from a decision passed by the Principal Sudder Ameen of Mymensingh, dated the 29th July 1864, *revers-*

ing a decision passed by the Moonsiff of that District, dated the 28th December 1863.

Rooknee Kant *alias* Anund Mohun Sircar (Plaintiff), *Appellant*,

versus

Karoona Moyee Goopta and others (Defendants), *Respondents.*

Baboos Onoocool Chunder Mookerjee and *Mohinee Mohun Roy* for Appellant.

Baboos Sreenath Doss and *Dwarkanath Mitter* for Respondents.

The right to bring a suit for possession as heir to a deceased person does not accrue during the life-time of the deceased's widow.

THE plaintiff in this case sued for possession of certain land by right of inheritance as heir of one Gopeenauth.

The defendant held possession of the land claiming under a hibbah jointly executed by two childless widows, namely Koroona Moyee, the widow of Gopeenauth, and Obhoya, the step-mother of one Kishen Shurn, deceased, of whom Gopeenauth in his life-time had been heir.

The Court of first instance granted the plaintiff's claim, but the Lower Appellate Court reversed this decision, holding that, as to the moiety of the land alienated by Koroona Moyee, inasmuch as she was the childless widow of Gopeenauth, she was entitled to hold the lands against his heirs for her life-time, and she being still alive, the plaintiff's title had not accrued; and as to the moiety conveyed by Obhoya, as she had held it adversely to Gopeenauth himself during his life, and after his death to his heirs for more than 40 years altogether, the plaintiff's remedy was barred by the Statute of Limitations.

On special appeal to this Court, the plaintiff now urges:—

1*st*. That the Lower Appellate Court made an error in law as to the operation of the Statute of Limitation under the circumstances of the case.

2*nd*. That the Lower Appellate Court misconceived the nature of the suit, and erroneously supposed that an action for waste could not be brought by the heirs against the widow, unless the property was threatened with total annihilation or destruction.

On this second point, we observe that the suit is brought simply for the recovery of the land itself on the ground of improper alienation, and is in no way of the nature of an impeachment of waste, nor does the plaint even allege that there is or has been waste in the legal sense of the term. The Lower Appellate Court is, therefore, quite right in holding that the plaintiff's right to bring the action has not accrued, as Koroona Moyee is admitted to be still alive.

As plaintiff claims both moieties as heir to Gopeenauth, and therefore after his widow, the decision on the second point applies to both pleas, and, therefore, it is entirely unnecessary to enquire as to the operation of the Statute of Limitations.

The 24th March 1865.

Present:

The Hon'ble E. Jackson and F. A. Glover, *Judges.*

Attachment (for arrears of rent)—Suit by dur-ijaradar for profits.

Case No. 2304 of 1864.

Special Appeal from a decision passed by Mr. F. C. Fowle, Judge of Rungpore, dated the 20th May 1864, reversing a decision of the Principal Sudder Ameen of that District, dated 20th May 1864.

Nobokissore Roy (Defendant), *Appellant*,

versus

Nilmoonee Sircar (Plaintiff), *Respondent.*

Baboos Chunder Madhub Ghose and *Romesh Chunder Mitter* for Appellant.

Baboo Issur Chunder Chuckerbutty for Respondent.

A dur-ijaradar and ijaradar had both defaulted in the payment of their rent respectively, and the zemindar attached the estate according to his agreement with the ijaradar. The dur-ijaradar having sued both the zemindar and the ijaradar for the profits of the estate during the term of his lease,—HELD, that the zemindar who had collected the profits, and not the ijaradar, was liable to pay the dur-ijaradar the profits of the estate over and above the rents.

THE special appellant was ijaradar of 3 annas of talook Hoboom. The zemindar, finding that the ijaradar had allowed the rent to fall into arrears, attached the estate according to the terms of his agreement with the ijaradar. The plaintiff, a dur-ijaradar, now sues both the zemindar and the ijaradar, for the profits of the estate during the term of his lease.

The first Court dismissed the whole claim as against both the zemindar and ijaradar, being of opinion that the dur-ijaradar had defaulted in the payment of his rents, and had

been accordingly dispossessed and could not recover.

The Judge, on appeal, gave the dur-ijaradar a decree against the ijaradar, being of opinion that, even although the estate was attached, the dur-ijaradar was entitled to his profits; but dismissed the claim as against the zemindar, because he was of opinion that the zemindar was not obliged to recognize the dur-ijaradar.

This view of the law is objected to on special appeal, and we think it is erroneous. The dur-ijaradar is, notwithstanding the attachment, as the Judge has correctly ruled, entitled to receive the profits of the estate over and above the rents. But as those profits are in the hands of the zemindar, and have been collected by him, it is he who is liable to pay them to the plaintiff, and the decree should be given against him and not against the ijaradar. The attachment, it is said, was carried into effect in consequence of the default of the ijaradar; but it has been found that the dur-ijaradar had also defaulted in the payment of his rent. There is, therefore, no force in the allegation that the dur-ijaradar was dispossessed in consequence of the negligence of the ijaradar.

The decree of the Judge must be reversed, and the case must be remanded to the Lower Court to take an account from the zemindar of the amount of profits due to the dur-ijaradar, and to decree accordingly.

The 24th March 1865.

Present:

The Hon'ble George Loch and W. S. Seton-Karr, *Judges.*

Suit for possession—Allegation of dispossession—Onus probandi.

Case No. 357 of 1864.

Regular Appeal from a decision of Baboo Tarakant Bidyasagur, Principal Sudder Ameen of Jessore, dated the 27th June 1864.

Gooroodoss Roy (Plaintiff), *Appellant,*

versus

Huronath Roy and others (Defendants), *Respondents.*

Mr. R. T. Allan and *Baboo Hemchunder Banerjee* for Appellant.

Baboo Sreenath Doss, Obhoy Churn Bose and *Bungseedhur Sein* for Respondents.

When a plaintiff sues to recover possession upon a distinct allegation that he was in possession, and that on a certain date, he was forcibly and wrongfully dispossessed by the defendants, the *onus* is on him to prove his allegation before the defendants can be called upon to substantiate their claim.

THE plaintiff sues to recover possession with mesne profits of certain lands in kismuts Shalpakhia, Gobindpore, Joogeejul, and Noodkhalee, situated within the talook of Andarkota Khalishakhallee, Pergunnah Noldee.

There are five sets of defendants who are in possession of the lands claimed in this suit, and hold them under distinct titles:—

1. Huronath Roy, Radhachurn Roy, and others claim the lands in their possession as part of their talook Norail; and others as detailed in their written statement.

2. Nilcomul Ghose claims his land under a mourosee lease given by the ancestors of the plaintiff and of the principal defendants to Ramdhun Sirkar, from whose heirs he purchased it. He states that the plaintiff once before sought to set aside the mourosee tenure, but failed, it having been held by the late Sudder Court that the suit was barred by limitation.

3. Chendeee Churn Bhuttacharjee claims his lands as Brohmotur.

4. Essen Chunder Nyarutno and Mohesh Chunder Bhuttacharjee claim their lands as Brohmotur.

5. Juggodumba claims possession of pakees 2-15-3 in chuck No. 3 of the map of Joogeejul, as appertaining to her purchased talook Kooreegram.

The allegation of the plaintiff is that he was in sole and actual possession of the land in suit; that they are situated near the family residence of Norail, and that he was deprived of possession by Ram Ruttun Roy, Huronath Roy, and Radhachurn Roy, on 26th Assar 1262 B. S., who ousted him by wrongfully and forcibly collecting rents from the tenants in the name of their relative Nilcomul Ghose; that when the lands were thakked previous to survey the names of the parties in possession were recorded by orders of the Superintendent of Survey, bearing date the 25th June 1857 (1264) and a note of the plaintiff's claim was recorded in the map.

The case went to trial in the Lower Court on this allegation made by the plaintiff of previous possession and dispossession on a specified date, the defendants denying that they had dispossessed him. The Lower Court dismissed the claim, holding that plaintiff had failed to prove his case; and in regard to the lands claimed by some of the defendants as lakheraj, it ruled that the

plaintiff might institute a separate suit for resumption, but could not try the validity of these titles in the present case.

The plaintiff has come up in appeal, and endeavours to throw the onus of proof upon the defendants, urging that, as they admit that the lands are situated within plaintiff's zemindaree, it is for them to substantiate their allegations, for the claims of some of the defendants cannot be looked upon as adverse but subordinate to the plaintiff's; and in regard to those who claim to hold as lakherajdars, there can be no difficulty in trying the validity of their title in the present suit; and such, it is pleaded, would be the proper course to follow, because the parties have filed their documents and further litigation would be stopped; and though plaintiff has brought his suit unadvisedly in the shape of a charge of dispossession and a claim for recovery of possession, and has failed in the opinion of the Lower Court to substantiate his allegations, yet, under the rulings of this Court, the whole question of title as between the parties can be gone into, though the form in which the action is brought, be defective.

We think the plaintiff cannot change the form of his action in appeal. His allegation was that he was in possession, and that, on a certain date, he was forcibly and wrongfully dispossessed, and he prayed to recover possession. On this allegation the case went to trial in the Lower Court, and proof was brought by plaintiff to support this allegation, which was held by the Principal Sudder Ameen to be insufficient to support his claim. Had plaintiff come in with a general claim to the land and given some proof that it formed part of his zemindaree, we might, on that evidence, or on the admissions of the defendants, have called upon them to prove their case; but as plaintiff has chosen to make a distinct allegation which is capable of positive proof, we think it is necessary for him to satisfy the Court of the truth of his allegation before we call upon the defendants to substantiate their claim.

The appellant is correct to a certain extent in stating that the possession of the defendants is not adverse to him; but he is also incorrect in this statement, for, owing to the form in which the action has been brought, the possession of defendants must be considered adverse. Take for instance the case of the defendant, Nilcomul Ghose. He claims to hold under a mourosee lease lands admittedly within the plaintiff's zemindaree. So far there is no adverse possession, and in claims for rent adverse possession could not be pleaded. But when plaintiff brings his action in its present form; and says, "I was in actual possession of certain portions of land from which defendant has ousted me;" and defendant says, "the lands were in my actual psosession as part of my mourosee tenure, and were not in your possession at all," then, as regards the question to be decided between them, the possession of the defendant must be considered to be adverse, for the question then resolves itself into this—Is the area in dispute part of the lands which were in the actual possession of the plaintiff? or do they form part of the tenure of the defendants? and in this view of the case, the form in which the plaintiff has brought his action is important. We proceed, therefore, to look into the merits of the claim as brought by the plaintiff.

His first objection is that the investigation below is imperfect, because the evidence of all his witnesses has not been taken. He summoned 24, of whom 9 were examined, and the others dismissed without examination, because all of them were called to speak only to one and the same thing. This objection, we observe, is not taken in the petition of appeal, and we may gather from its omission that the order of the Lower Court directing the discharge of these witnesses, without examination, was not considered by the plaintiff as materially damaging to his case, and that he did not think it worthy of notice till he found it useful as a ground of appeal. He does not show us that he made any objection to the order of the Principal Sudder Ameen, for, no doubt, had he insisted on having these parties examined, the Principal Sudder Ameen would have been bound to comply with his request, however much he might consider their examination useless. However, it is not by the quantity but by the quality of the oral evidence that a Court will be assisted in coming to its decision; and in this case we find the quality of this evidence not superior to that usually brought forward, nor a bit more worthy of credit. Plaintiff has allowed several years to pass without bringing his action; and he now calls up ryots, one from this village and one from that, to give evidence in support of his claim; but none of them, as far as we can see, are occupants of the lands in dispute, or, so far as is shown, in a position to know with certainty that the lands in suit belonged to and were held by plaintiff in actual possession. The plaintiff has filed certain

kubooleuts. These have been attested by witnessess, as the tenants are said to have deceased. Now, nothing is easier than to have a number of kubooleuts drawn in the names of imaginary persons; and to account for their not being forthcoming, when required to attest those kubooleuts, by alleging that they have died; and to bring forward witnesses to attest those kubooleuts, those witnesses having apparently no other occupation in life than to be present at all times whenever a kubooleut is taken. Certain jumma wasil bakee papers are produced, and these, it is urged, afford satisfactory proof that the lands belong to the plaintiff because the ryots, whose names appear in those papers, occupied the whole of the lands in the four kismuts portions of which form the subject of the present suit. Here again the writer of those papers is said to have deceased, and his son or grandson is called to attest the writer's signature to them. Papers of this kind merely show the quantity of land held by each ryot, the jumma payable by him, the sum collected from him, and the balance due by him. How it is possible for any Court to determine from such papers that certain plots of land claimed by the plaintiff are mentioned therein, we are at a loss to discover, particularly as no attempt is made to enlighten the Court by pointing out which of the plots in dispute is held by this or that ryot whose name is entered in the accounts.

We are next referred to a decision of 20th June 1856 passed by the Principal Sudder Ameen in a case brought by the present plaintiff against the principal defendants in this case, and Ramdhun Sirkar, from whom Nilcomul Ghose purchased the mouroosee pottah. This was a suit for possession of lands in Bhadaleedangah, and held by Ramdhun Sirkar under a mouroosee lease. The pottah was filed in that case; but not being on stamped paper, it was not looked at, and the Principal Sudder Ameen gave a decree against Ram Rutton Roy, Huronath Roy, and Ramdhun for possession and mesne profits. The two former appealed; and the decision of the Lower Court was reversed in respect to them, but stood conclusive against Ramdhun Sirkar. And the object with which that decision is now filed is to get rid of the mouroosee lease which is pleaded by Nilcomul Ghose in the present case. It was, however, pointed out to the appellant's vakeel that he had failed to show any connection between the pottah referred to in that judgment and the lands now in dispute. He read to the Court the pottah filed in that case, but was obliged to admit that from its wording he was unable to show that it was the same pottah as that under which the defendant Nilcomul pleaded to hold; and he then pressed upon the Court that, if the above decision be rejected as proving nothing, the reasoning of the Principal Sudder Ameen based upon it, must fall with it. We think that the appellant has failed to connect the decision of June 1856 with the lands now in dispute, and that it does not assist his case; failing this there is only the general evidence to which we have adverted above, and which we think to be of such a character as not to warrant our disturbing possession after the lapse of so many years. We, therefore, without calling on the opposite side, dismiss the appeal with costs.

The 24th March 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Sale of Putni (Reversal of, by one sharer) —Rights of the other sharers—Mesne profits.

Case No. 412 of 1864.

Regular Appeal from a decision of Baboo Goopeenath Bose Rai Bahadoor, Officiating Principal Sudder Ameen of Nuddea, dated the 1st October 1864.

Tarinee Prosad Ghose (Defendant), *Appellant,*

versus

Banee Madhub Panday (Plaintiff), and Shoshee Mookhee Barmonya (*pro formâ* Defendant), *Respondent.*

Mr. R. V. Doyne and *Baboos Kishen Kishore Ghose* and *Dwarka Nauth Mitter* for Appellant.

Baboos Banee Madhub Banerjee, Obhoy Churn Bose, Banee Nauth Bose, and *Onoocool Chunder Mookerjee* for Respondents.

The sale of a putni under Regulation VIII of 1819 having been reversed at the suit of A one of the sharers, it is not necessary for B, another sharer, to sue for the reversal of the same sale; but B, or those who claim under him, are entitled to mesne profits for the time when B was out of possession by the action of the sale in question.

THIS is a suit for mesne profits from the 2nd of Jyeshto 1265 to the end of 1268, the right to which has been purchased by the plaintiff from the *pro formâ* defendant Shoshee Mookee Barmonya.

The facts, which are not disputed, are briefly stated as follows :—

The zemindar Ranee Surnomoyi caused a putni belonging to Kessub Chunder Roy and others to be sold under Regulation VIII of 1819. The defendant Tarinee Prosad obtained possession ; but one of the sharers in the putni, in a suit to which the plaintiff's vendor was not a party, sued to reverse the sale on the ground of irregularity, and obtained a decree. The vendor of the rights which the plaintiff in the present suit has purchased, did not herself, or through her husband, ever sue to reverse the sale of the putni, though she, or rather through her the purchaser, now claims mesne profits for her share of the tenure, And the main question which we have first to determine is, whether, as argued by Mr. Doyne for the appellant, the plaintiff has any *locus standi* in Court.

After hearing a good deal of argument on both sides, and after referring to the cases noted in the margin, we are clearly of opinion that the Lower Court has decided rightly. Chunder Mohun, one of the putnidars, sued to reverse the sale, and obtained a judgment absolutely nullifying and setting aside the sale. This judgment we accept as a judgment *in rem*. A sale cannot be half reversed and half upheld, as the Principal Sudder Ameen correctly remarks. I cannot, from its nature, be limited to the particular share of the party putting the law in force. Nor would there be any reason in compelling a shareholder to sue, as regards his own share, for the reversal of a proceeding which had been already declared absolutely null and void on the ground of material irregularity. This view is strengthened by the language of the decisions quoted, and especially by the language of the decision of March 22nd 1858 in which it was ruled that one plaintiff might recover possession of his share, the other shareholders recovering *at their pleasure*.

S. D. 1844 p. 148
1848 p. 176
1858 p. 476

Now, in the present case, the plaintiff does not want possession, inasmuch as the putni has again been sold ; but he demands mesne profits for the time when the sharer, whose rights he has purchased, was illegally out of possession by the action of a sale which ought never to have taken place and which has been reversed. The present is not a similar case to an action for trespass, in which it might perhaps be argued that B, one sharer, could not lawfully take advantage of the activity, and the results of a suit brought by A.

On this point, then, we decide the appeal against the defendant.

But on the amount of mesne profits decreed to the plaintiff by the Lower Court, we are of opinion that there is ample ground for amendment.

The claim is estimated for all the years except 1268, at 1,200 rupees, which is the rent payable by a dur-putnidar in whose favor such a tenure had been created by the putnidar in 1265 at a rent of 52,700 rupees, and for a bonus of 74,000 rupees.

For the last year, however, the plaintiff claims, not his share of the dur-putni rents, but a sum based on what the defendant actually realised from the dur-putnidar in a separate suit. Such a claim on the part of the present plaintiff is really one for special damages ; and the plaintiff cannot show that he has suffered loss in any way, or that there is any privity whatever between him and the defendant in this matter.

The reasoning of the Lower Court on this head is faulty and confused, and it has needlessly complicated the question at issue by dwelling at length thereon.

Our order will then be to the effect that the plaintiff, as purchaser of Shoshee Mookhee's rights to the rent of the dur-putni and to nothing more, will get her share of wasilat, out of 1,200 a year from the 2nd of Jyeshto 1265 to the end of 1268. He will, however, get no interest on the above sum, as his vendor was out of possession by a formal sale, and by no evil act of the defendant. He will, of course, get interest from the date of suit, on the said share.

And the plaintiff, and not the defendant, will be liable for the costs of the *pro formâ* defendant Shoshee Mookhee, who at once disavowed all connection with the putni share which she has sold, and whom the plaintiff had no business to drag into Court.

Order of the Lower Court modified to the above extent with costs in proportion.

The 12th March 1865.

Present :

The Hon'ble W. Morgan and Shumboonath Pundit, *Judges*.

Unlawful dispossession by Government Officers—Limitation (Section 15 Act XIV of 1859).

Case No. 439 of 1864.

Regular Appeal from a decision passed by Captain B. W. Mortan, Deputy Com-

missioner of Gowalparah, dated the 10th August 1864.

Protab Chunder Burooah (Plaintiff), *Appellant,*

versus

Ranee Kantaeswurree Dabee and others (Defendants), *Respondents.*

Baboos Dwarka Nauth Mitter and *Sree Nauth Doss* for Appellant.

Mr. C. Gregory and *Baboos Mohinee Mohun Roy* and *Juddoo Nauth Mookerjee* for Respondents.

When a Deputy Collector, acting as agent for a minor, uses powers which belong to the Government alone for the resumption of invalid lakheraj tenures, and by virtue of those powers resumes lands for the benefit of the minor, and unlawfully dispossesses the previous holder—

Quære.—Whether such a dispossession is within the contemplation of Section 15 Act XIV of 1859, or not.

That Section does not confer on the person who unlawfully acquires possession of the land, the advantage of a short period of limitation on the expiration of which the dispossessed person is bound to show an absolute title to recover. It gives to the dispossessed person who has been wrongfully deprived of possession a right to recover possession within six months, without regard to any title, however clear, which may be set up against him. If he sues after six months have expired, the parties to the suit are left in the same condition as they would have been in under the former law with reference to the production of proof.

It is not necessary that we should decide in the present case, whether the plaintiff has a valid lakheraj title to the lands for the possession of which he sues: we have only to determine whether he is not at least entitled to be put back in the possession of those lands. It is admitted by the pleaders for the defendants (Respondents here), that the plaintiff has been dispossessed of the lands, and that she has been dispossessed without his consent and otherwise than by due course of law. The lands in question are situate within pergunnah Khootaghat which belongs to the defendant, the minor Rajah of Bijnee. The plaintiff asserts that these lands, amounting to about 2,000 beegahs, form a mouzah called Basee, which is the lakheraj property of the plaintiff: on behalf of the defendant it is insisted that this mouzah Basee is a portion of the defendant's pergunnah, for which the plaintiff has since the year 1790 paid rent, but which at some recent period by undue means he has attempted to convert into his lakheraj land. The estates of the Rajah having fallen into confusion, application was made to the Government to depute a Deputy Collector to assist in the management of the property. That officer proceeded to resume for the Rajah this mouzah Basee which the plaintiff claimed as lakheraj, using for the Rajah's private benefit the powers which belong to the Government, and to the Government alone, for the resumption of invalid lakheraj tenures. By virtue of these powers he resumed the lands, and the plaintiff was dispossessed of them. We have already said it is admitted on all sides that the Deputy Collector, being in fact the agent of the Rajah and acting on his behalf and not lawfully possessing the power which he would have had when acting on behalf of the Government, had no authority to resume the land and that the plaintiff has been unlawfully dispossessed. More than six months have elapsed since the dispossession, and the question has been much argued before us, whether the 15t Section of the Limitation Act XIV of 1859 applies, and if does apply, what is the proper construction of the Act. It is contended for the defendants (the respondents here), that the plaintiff having been dispossessed, and having failed to sue to recover possession within six months from the time of his dispossession, as is required by that Section, is bound in the present suit to prove a valid title to the lands claimed by him before he can obtain a decree. On the other hand, it is said that that Section has no application to this case, and that even if the plaintiff might have sued under its provisions within six months, the proper construction of that Section is to give the *actual* possessor of land who has lost his possession under the circumstances there supposed, an absolute unqualified right to be restored to the possession (nothwithstanding that his opponent may show in himself a clear title and consequent *right* of possession), and that the Section was not intended to impose on the person dispossessed (for the benefit of the unlawful dispossessor any materially different burden of proof from that which he would have had to undertake in a suit, brought before that Section, to recover lands from which he had been dispossessed.

That Section contains a provision similar to the 4th Section of the repealed Act IV of 1840, the jurisdiction being now given to the Civil Court instead of to the Magistrate. By the 4th Section of Act IV of 1840, any person might complain to a Magistrate that he had been, without authority of law, forcibly dispossessed of land; and the Magistrate, after enquiry, might order the person complaining to be put again into

possession and maintained in possession until the right to possession was determined by a competent Court. The party complaining was bound by that Section to prefer his claim within a month from the time of his dispossession. The present Section gives a jurisdiction not precisely in the same terms or limited in the same way, and gives it to the Civil Court in a suit to recover possession, instead of to the Magistrate. But we are inclined to think that the object of the Section was that the Court in such a suit should determine questions not wholly unlike those which under the 4th Section of the law of 1840 were disposed of by the Magistrate—special cases in which by force or fraud a person had been deprived of the possession of property. The enquiry in such cases of forcible dispossession (the only cases within the express provisions of the old law) was respecting the fact of actual possession. The Magistrate proceeded without reference to the merits of the claims of any person to the right of possession (Section 2 of Act IV of 1840). He enquired "what party was in possession when the dispute arose," and he was directed to restore the possession to that person who was to be declared "entitled to retain it until ousted by due course of law." The cases contemplated by Section 15 of Act XIV of 1859 may perhaps be cases in which the Court has to consider disputes regarding possession not unlike in character to those disputes which under the old law the Magistrate would have dealt with, the class of cases within the new jurisdiction being extended so as to include dispossession brought about by fraud or other illegality as well as forcible dispossession. It is observable that this new provision occurs in an Act limiting suits, and that in form it is given in the shape of a short limitation of six months where the suit is of the particular description which we have mentioned. The words of the Section "dispossessed otherwise than by due course of law" are extensive enough to include other cases of dispossession besides forcible or fraudulent dispossessions, and may possibly extend to such a dispossession, for instance, as has occurred in this case, where the officers of Government unlawfully use certain powers with which they are vested in a special class of cases to dispossess a person from his lands. It is unnecessary for us to decide whether such a case falls within the contemplation of the Section or not. We may, however, say that, even assuming that it does, it by no means follows that the true construction of the Section is that which confers on the person who unlawfully acquires possession of land, the advantage of a very short period of limitation on the expiration of which there is imposed on the dispossessed person the duty of showing an absolute title to recover. It may be that the Section gives a right of suit within the six months (the enquiry in such suit being strictly confined to the fact of possession by the plaintiff, and the immediate circumstances of force or fraud or illegality attending his dispossession, without regard to any title, however clear, which may be set up), and that, after the expiration of those six months, the parties are left in the same condition as they would have occupied under the former law with reference to the production of proof. We think that, according to the old law (although the authorities are not uniform) a person who had been dispossessed, in suing to recover possession, would have been entitled to a decree upon proof short of proof of absolute title. He would be entitled to succeed in his suit by showing a previous peaceable possession by him, and an apparently wrongful dispossession by the defendant, and, if no further evidence were given on either side, the Court as against an apparent wrong-doer who showed no right or title whatever in himself, would have held the prior possession of the plaintiff *primâ facie* sufficient proof of title in him.

In the suit now before us, the evidence which we have fully heard satisfies us that, even assuming the law to impose on a plaintiff, in the position of the present plaintiff, a heavier burthen of proof than we suppose it to do, still the plaintiff has established his right to a decree in this suit. We have already said that we do not consider ourselves called upon to decide, nor can we decide in a suit framed as this is, whether the plaintiff has a valid lakheraj title. The matter for us to determine is whether he is not entitled, upon the evidence which he has given, to get back the possession of his property. When he has been restored to possession, the question may be determined, either between himself and the Government, or between himself and the Rajah, whether he is entitled to retain possession as a valid lakherajdar or upon any other terms. He has shown in this suit, first, undoubtedly, that he has for a great number of years been in the possession of the mouzah. He has also produced proof extending back for a great number of years of various grants

made by him to several persons of portions of the mouzah Basee as lakheraj. As to the payment of rent for any portion of the lands by him or his ancestors to to the Rajah or his predecessors, there is no evidence whatsoever given. Some quinquennial papers are produced by the defendant, and relied on by him to show that the plaintiff's ancestors held Basee under an ijara at a rent of 16 rupees 14 annas. Those papers mention a place called kismut Basee as held under an ijara. The plaintiffs insist that they refer to a distinct place from their mouzah Basee. The papers speak of "kismut Basee," probably some division of a larger place of that name. We find in fact that there is a "Basee" in the pergunnah in question adjacent to the plaintiff's mouzah of that name, and that it is now called *khoodro* or title Basee: without saying that the quinquennial papers absolutely refer to one Basee rather than the other, it is certain that this evidence leaves us in doubt whether the quinquennial papers really support the case of the defendants. It is also certain that the papers in question are not implicitly to be relied on, because, with reference to another mouzah which has been the subject of dispute between these parties, they are found incorrectly to describe as *mâl* lands which in the result were ascertained to be lakheraj.

Upon this state of the proof, we think that the plaintiff has shown enough to entitle him to recover possession from the defendant. He has given at least some *primâ facie* proof to show that the mouzah in question is his property, and the defendant has failed to give any satisfactory answer to this, or two show even, if it be conceded not to be a valid lakheraj, by what right the defendant can claim any interest therein, much less the possession of the land. The defendants have adduced little or no evidence to show that the lakheraj is one of later date than 1790. In this state of matters, it is clear that, whatever may be the ultimate determination (if the case ever comes to be determined) with reference to the absolute validity of the lakheraj, there is no evidence to show that it is a lakheraj of later creation than 1790. If so, as the mouzah is in extent upwards of 1,995 beegahs, it is clear that in no view can the defendants have any claim whatsoever to resume it, or any interest in it, or to withhold the possession from the plaintiff. If there is any right to assess the mouzah, it must exist in the Government, and must be asserted in proceedings the effect of which would be to recognize and leave undisturbed the undoubted right of the plaintiff to the possession of the lands.

We think that the proof produced is sufficient to enable us to award a decree for the plaintiff, restoring him to the possession of the lands. The judgment of the Court of first instance will be reversed with costs.

The 24th March 1865.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Evidence—A priori consent to abide by the, of a certain witness (Effect of)—Courts to be careful in granting applications for the examination of such witnesses.

Cases Nos. 2932, 2942, and 2943 of 1864.

Special Appeals from a decision passed by Mr. A. H. Davidson, Principal Sudder Ameen of Hooghly, dated the 26th July 1864, *reversing a decision passed by the Moonsiff of that District, dated the 25th August* 1864.

Luckee Monee Dosee (Plaintiff), *Appellant,*

versus

Shunkurree Dossee and others (Defendants), *Respondents.*

Baboos Onoocool Chunder Mookerjee and *Sib Chunder Mozoomdar* for Appellant.

Baboos Umbica Churn Banerjee and *Mohendro Loll Seal* for Respondents.

And *a priori* consent to abide by the testimony of a certain witness cannot bind the consenting party to hearsay testimony, but only to such evidence as is legally admissible, *i. e.*, evidence as to such facts as the witness can directly speak to.

Before granting an application for the attendance and examination of such a witness, the Court should take care that the purpose of the application is compromise and submission.

It is admitted by all parties that these three special appeals depend upon one and the same ground of objection, and that our decision upon that will at once determine the fate of them all.

The plaintiff sued for possession with mesne profits of certain lands, to which she claimed to be entitled through a conveyance made by one Huromonee Dossee, the childless widow of one Kistomohun. The defendants sought to invalidate this title by setting up, amongst other things, 1*st*, that Huromonee had left her husband Kistomohun during his life-time, and became a prostitute, and remain-

ed away from him, leading a life of unchastity until his death, and afterwards; 2*nd* that Kistomohun himself died during the life-time of his father, and therefore, as the land in question was acknowledged to be family property, Kistomohun's widow could have had no share in it.

It appears that Gungà Dhur, one of the defendants, a joint talookdar of the land, and having custody of papers connected with the payment of rent, was alleged by the plaintiff to be as important witness for her, and was summoned by her to give evidence, but he did not obey the summons.

The Court of first instance found in favor of the plaintiff.

On appeal, the Principal Sudder Ameen found that, although the Lower Court had properly framed the above-mentioned two issues, it had not given the defendants the opportunity of supporting them with evidence. The Principal Sudder Ameen, therefore, postponed the case for the purpose of giving the defendants the required opportunity.

Upon this the plaintiff petitioned the Court against the postponement, saying that "although the defendant Gunga Dhur has "concealed himself, and not made his own "deposition, but has prayed that other proof "should be given by Tincouree, still he is "such a respectable man that, if he will only "come forward and give his testimony, all ob-"jections will be settled, and no other proof "will be necessary."

The prayer of this petition was acceded to. Gunga Dhur was summoned by the Appeal Court: he came and was examined. The finding of the Principal Sudder Ameen on his evidence is as follows:—

"He supports *in toto* appellant's evi-"dence below, and deposes that Huro-"monee Dossee left her husband's house, "and is leading an unchaste life in "Calcutta, that he bought from Tincouree "Sircar his share of the disputed ground, and "that Huromonee Dossee's husband died be-"fore his father. Therefore, it is clear that "respondent Luckee Monee Dossee's vendor "has no right or title to, and was never in "possession of, the subject matter of suit." The Lower Appellate Court, therefore, reversed the judgment below.

The special appellant now contends before us that this judgment is wrong, because all that Gunga Dhur said bearing on the points in issue was spoken from hearsay, and that the appellant when agreeing to abide by his testimony meant only such testimony as should be legally admissible.

On looking at Gunga Dhur's deposition, it certainly appeared that all he knew about Huromonee having left her husband and become a prostitute, amount to this, that some prostitute, not otherwise identified, had told him, when he visited her, that she was Kistomohun's wife, and that this has been confirmed by two other prostitutes also not identified. This is hearsay evidence of the very loosest character, and would be absolutely valueless under all circumstances. As to his knowledge of the relative time of Kistomohun's death, and that of his father, he says, "It was from enquiry and looking at the jumma wasil papers that I came to know that Kistomohun died before his father." Therefore, on this point also, his evidence is purely hearsay, and, as such, strictly speaking, inadmissible in a Court of law: but its intrinsic value is obviously very different from that of the former; and while we think that scarcely any form of *a priori* consent ought to render the plaintiff bound by that testimony, we can conceive it very possible that she might have agreed to abide by the latter. She might well have said, "Gunga Dhur knows "from books and papers in his possession, "who was the recognized and proper owner "of the land, and I agree that what he says "on the point from that means of know-"ledge shall decide this suit." In this way she would in effect have made him rather an arbitrator than have treated him as a witness.

The question then is, has she by her petition done so in this case? And here we take the opportunity of observing that, as the law now provides for the compulsory attendance of the parties to the suit, as well as other persons, for the purpose of giving evidence, such an application to the Court, as that made by the plaintiff, is not necessary for the purpose of procuring the witness, and can have no meaning unless it impliedly gives up some of the strict rights of a litigant, and amounts in some sort to a submission to arbitration. The Courts below, before they grant such a petition ought to take care that its purpose is plainly that of compromise and submission, otherwise they run the unnecessary risk of lending the process of the Courts to the prosecution of a wager of law.

In this case we think the plaintiff intended no more than to abide by Gunga Dhur's evidence as to such facts as he could direct-

ly speak to. Under these circumstances the evidence upon which the Principal Sudder Ameen bases his judgment, must be considered struck out of Gunga Dhur's deposition and consequently this case must be remanded to the Lower Appeal Court for fresh consideration.

The 24th March 1865.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Special Appeal (from order rejecting re-hearing of an appeal dismissed for default of prosecution)—Reasons for rejection to be stated.

Case No. 2905 of 1864.

Special Appeal form a decision passed by Moulvie Mahomed Nazim Khan, Principal Sudder Ameen of Mymensingh, dated the 27th August 1864, *affirming a decision passed by the Moonsiff of that District, dated the 24th August* 1861.

Huro Chunder Doss Chowdhry (Defendant), *Appellant,*

versus

Ram Coomar Chowdhry (Plaintiff), *Respondent.*

Baboos Sreenath Doss and *Unnunt Ram Ghose* for Appellant.

None for Respondent.

A special appeal lies from an order passed under Section 347 of Act VIII of 1859 rejecting an application for the re-hearing of an appeal dismissed for default of prosecution.

The reasons for rejecting such an application should be stated.

In this special appeal we have to observe that the case was called up by the the Lower Appellate Court on the 7th November 1862, and, in the absence of the parties, the appeal was on that day dismissed for default. On the 15th December 1862, the special appellant here petitioned the Principal Sudder Ameen to the effect that the case was called on without any day having been fixed for hearing, and, therefore, his absence was not a default which render his appeal liable to be dismissed. At that time, no order seems to have been passed on this petition; but on the 27th August 1864, the petition was taken up by the Principal Sudder Ameen, and in the presence of the parties it was recorded that no reason had been shewn for restoring the appeal.

The special appeal is on two grounds:—1*st*. That the original appeal should not have been dismissed on the 7th November 1862, on default without a day having been fixed for the hearing; 2*nd*. That the Principal Sudder Ameen should have given some reason for rejecting the petition of the 5th December 1862, which distinctly alleged that a day ought to have been before fixed for the hearing.

A preliminary objection was made that a special appeal would not lie; but seeing that an order passed under Section 347 of Act VIII of 1859, as this was, has been decided by this Court, in a decision cited below, to be a decision of a regular appeal; we think a special appeal will lie.

We further think both the objections taken by special appellant are valid. The order of the 7th November 1862 should have recorded that a day had been fixed for the hearing, and that thereupon the default had followed; and the Principal Sudder Ameen should, in his order of the 27th August 1864, have stated why he did not think this specific plea in the petition of the 5th December 1862, valid.

As this is an error in law in the procedure, we decree the special appeal.

We observe that a similar case of the *same Principal Sudder Ameen* is recorded in page 23, Volume II, No. 7, of the Weekly Reporter, case 349, 13th February, Seton-Karr and Campbell, J. J., Miscellaneous, Ram Yad Jemadar *versus* Bissessur Bhuttacharjee. The same error in law and same delay are there apparent, and the order is of the same date, 27th August 1864. It was there also held that a special appeal would lie.

The delay should be explained, and a precept will go with this decree to call for such explanation.

The 24th March 1865.

Present:

The Hon'ble E. Jackson and F. A. Glover, *Judges.*

Suit for share of mesne profits in excess of mortgagee's claim.

Case No. 2334 of 1864.

Special Appeal from a decision passed by the Additional Judge of Bhaugulpore, dated the 8th June 1864, *reversing a decision passed by the Principal Sudder*

Ameen of that District, dated the 20th December 1862.

Chuttur Dharee Singh (Plaintiff), *Appellant*,

versus

Meer Khedmut Ali and others (Defendants), *Respondents.*

Baboos Anund Gopal Paleet and *Kalee Kishen Sein* for Appellant.

Mr. R. E. Twidale for Respondents.

In a suit to recover a share of mesne profits alleged to have been collected over and above the mortagee's claim, the plaintiff is not bound to sue in conjunction with his co-mortgagors. The Court may, under Section 73 Act VIII of 1859, direct them to be made co-plaintiffs, and try the case with reference to all the interests concerned.

THIS was a suit by the plaintiff as purchaser of a one-third share, *viz.*, a 4 annas out of 12 annas of mouzah Benkhoondee to recover a sum of 3,845 rupees alleged to have been collected by the defendant, the zur-i-peshgeedar, over and above the amount *plus* interest for which the lease was granted.

The Court of first instance gave plaintiff a decree; but the Judge, on the authority of a decision of the late Sudder Court, dated June 18th, 1822 (Select Reports, Volume III) ruled that as the document on which plaintiff claimed showed that the agreement between the parties was not a simple lease (as stated by him) but a mortgage, he could not sue to recover unless in conjunction with his co-mortgagors.

It is urged before us by the special respondent that this objection not having been taken in the Court of first instance, cannot now be received.

If this were the only objection to the Judge's decision we should not have been disposed to interfere, as the question was one of jurisdiction, which could have been advanced at any stage of the proceedings.

But we do not see any analogy between the two cases. In that quoted by the Judge, the plaintiff sued to redeem a mortgage; but in the present case, the suit is not for redemption, but to recover a share of mesne profits alleged to have been collected over and above the mortgagee's claim.

We think, therefore, that there must be a remand to the Court of first instance, in order that the case may be tried with reference to all the interests concerned.

Under Section 73 of the Code of Civil Procedure, the other owners of the estate should be made co-plaintiffs, and the right of the special appellant in this case to his 4 annas share should be determined. He has not proved that he holds such a share but the fact has not been denied by the other side, and if neither of the other shareholders dispute the point, it may be considered as established in his favor.

That being decided, the mortgagee should be called upon to prove his allegation that the zur-i-peshgee advance has not been liquidated. He must produce his accounts and show what has become of the usufruct of the estate during the years he has been in possession. If he fail to prove that he has still a lien on the property, the special appellant, supposing him proved to be a one-third owner of the land, will be entitled to that portion of the surplus, whatever it may be.

Costs will follow the result.

The 24th March 1865.

Present:

The Hon'ble W. Morgan and Shumboonath Pundit, *Judges.*

Suit to set aside alienations of ancestral property—Rights of distant reversioners.

Case No. 403 of 1864.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Shahabad, dated the 8th July 1864.

Bal Gobind Ram (Plaintiff), *Appellant*,

versus

Hirusranee and others (Defendants), *Respondents.*

Baboos Dwarkanath Mitter and *Hem Chunder Banerjee* for Appellant.

Mr. C. Gregory and *Moulvie Syud Murhamut Hossein* for Respondents.

Suit laid at Rupees 24,875-3 as. 9-pie.

Suit to set aside alienations made by the grandmother of the plaintiff. The plaintiff's mother, the immediate reversioner, being in possession of a part of the property comprised in the disputed alienations, and not being in a position to institute proceedings,—HELD that the plaintiff, as the next reversioner, was entitled to sue to protect his own future rights.

THE plaintiff, on 25th February 1864, sued to set aside certain alienations made by his maternal grandmother in favor of her husband's relations and others, and to obtain a declaration of his own rights as reversioner after the death of his grandmother. By the alienations complained of, the deceased father of the plaintiff, for himself and for the plaintiff and his infant brother, acquired

some right in the property. The plaintiff's mother was made a party to the suit, because she held the share conveyed to the plaintiffs father. Some of the defendants objecting to the right of the plaintiff to sue as reversioner during his mother's life-time, she, on the 1st April 1864, put in a petition consenting to the suit brought by the plaintiff. The Lower Court dismissed the suit on the ground of the plaintiff having fradulently concealed the priority of the mother's claim to his own.

There is no ground for inferring any such fraud. The mother was made a defendant, and the fact of her existence could not but be known to all. The real cause of her not appearing as plaintiff was her supposed incapability to do so owing to her being in possession of a part of the property comprised in the disputed alienations. The Judge below says, had the plaint set forth that the right of the plaintiff's mother had devolved on the plaintiff, the petition of the mother would have been taken into consideration. The allegations made by the mother in her petition, do not amount to a distinct admission, on her part either that she had before or has by the petition given up her rights. She simply gives a power to her son to sue. The right of the plaintiff, however, appears to us to be independent of this petition. He sues because his mother is not in aposition to take proper steps to remedy the injury done to the persons having subsequent interests in the property by the alienations complained of. In a case like this, where the *immediate* reversioner is so situated, and where, moreover, the immediate reversioner is a women having qualified and limited rights similar to the rights of the widow (the grandmother) whose acts of waste are complained of, the *next* reversioner, who has full and unlimited rights, may intervene in order to protect his own future rights. The right of a distant reversioner, after the death of the intervening life-tenants (the widow and the daughter of the maternal grandfather of a plaintiff), was recognized by a decision of the Sudder Court (S. D. Reports 1859, page 1627). The precedent of 12th May of 1859, reported in page 620 of the same book, is not applicable to the present case. We reverse the decree of the Lower Court, and decide that the plaintiff has a right to sue to set aside the acts of his grandmother so far as they affect his own rights of inheritance. The Judge below not having decided the case on the merits, we, under Section 351, remand it to the Lower Court to try the merits of the plaintiff's claim. The costs incurred by both the parties in the Court below, and in this Court up to this time, will, under the peculiar circumstances of the case, be borne by the plaintiff. The subsequent costs should follow the ultimate result.

The 24th March 1865.

Present:

The Hon'ble E. Jackson and F. A. Glover, *Judges.*

Limitation (in cases of non-suit).

Case No. 2345 of 1864.

Special Appeal from a decision passed by the Additional Judge of Bhaugulpore, dated the 30th May 1864, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 31st July 1861.

Purbhoo Narain Singh (Defendant), *Appellant,*

versus

Rajah Keelanund Singh (Plaintfff), *Respondent.*

Baboo Chunder Madhub Ghose for Appellant.

Baboo Unnoda Pershad Banerjee for Respondent.

According to the former procedure, where a suit before a competent tribunal ended in a non-suit, the period of limitation was computed from the accruing of the original cause of action, the time while the first suit was pending being deducted.

THIS was a suit by the special respondent, who was plaintiff in the Courts below, to recover possession of 94 beegahs 2 cottahs of land, situate in mouzah Estheree, by reversal of an award under Act IV of 1840, passed by the Magistrate and Judge respectively on the 21st of November and the 27th of December 1845.

It appears from the record that, on the occasion of the survey demarcation, the land was given to the plaintiff by Mr. Deputy Collector Drummond in the year 1838, who laid down the boundary between the two estates.

Both parties agree in declaring Mr. Drummond's boundary to be the correct one; and the only point, therefore, for decision is, where is that boundary?

Both Lower Courts found for the plaintiff and fixed Mr. Drummond's boundary line in

the position alleged by the special respondent.

It is now contended :—

(1). That the special respondent was out of time, and should not have been heard at all ; and,

(2). That the Judge had decided the position of Mr. Drummond's boundary line on totally insufficient evidence.

With regard to the first objection, we observe that plaintiff first brought his suit to reverse the Act IV decision in 1847. He was non-suited in 1852, on the ground that the quantity of land contained within the boundaries mentioned in his plaint was more than the quantity sued for. In 1857, plaintiff renewed his suit, the one now before the Court.

It is urged that the period which the plaintiff suffered to elapse between the order of "nonsuit" and the filing of the amended plaint in 1857, ought not to be allowed him, and that he is, therefore, barred by limitation.

But this doctrine is altogether opposed to the practice that obtained in our Civil Courts under the old Laws of Procedure, and by which practice the present suit must confessedly be governed. The rule was that, where there had already been a suit before a competent tribunal, which suit had ended in a non-suit, the period of limitation was computed from the accruing of the original cause of action, the time while the first suit was pending in the Court being deducted (*vide* Macpherson's Civil Procedure, page 65 ; and Sudder Dewanny Adawlut, Select Reports, July 26th 1847).

Under this rule the special respondent was within time ; but had it been otherwise, we should not have felt inclined to take the point into consideration, as the objection was not raised either in the Court of first instance or before the Judge in appeal.

The second objection is clearly untenable. The special appellant states that the evidence of the Nazir (the official who attended Mr. Drummond during the summary proceedings and marked out the boundary in accordance with his directions) is vague and unsatisfactory ; and that as the Judge proceeded entirely upon it, and had nothing else to guide him, his decision cannot be sustained. But, on looking into the record, we find that the Nazir's deposition was by no means the only evidence on which the Judge relied ; the Nazir did state that his recollections of the boundary were too vague to allow of his pointing it out exactly on a map, but added that, if he went to the spot, he should be able to point out the proper position of the line. This he was allowed to do ; he went to the spot and pointed out the line, as he himself had laid it down in Mr. Drummond's time.

The Judge, for reasons given, relied on this evidence, and his judgment is, therefore, one of fact with which we cannot interfere in special appeal.

The other grounds of special appeal noted in the petition were not taken.

Dismissed with costs.

The 27th March 1865.

Present :

The Hon'ble E. Jackson and F. A. Glover, *Judges.*

Jurisdiction—Question of fact—Special Appeal.

Case No. 2344 of 1864.

Special Appeal from a decision passed by the Judge af the 24-Pergunnahs, dated the 31st May 1864, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 13th August 1863.

Ramanund Roy Chowdhry (Defendant), *Appellant,*

versus

Urnokalee Debea (Plaintiff), *Respondent.*

Baboos Romanath Bose and *Nursingh Chunder Mitter* for Appellant.

Baboo Anund Chunder Ghosal for Respondent.

The Lower Appellate Court found that, though the defendant lived in Calcutta, he had a dwelling-house within the jurisdiction of that Court. In special appeal it was urged that the defendant had transferred to other parties his rights and interests in that dwelling-house. HELD that such an objection was not admissible in special appeal.

THE only question raised on this special appeal relates to jurisdiction. It is said that the 24-Pergunnahs Court in which the suit was brought had no jurisdiction, as the defendant was at the time living in Calcutta. The Judge found that, though he may have been to some extent living in Calcutta, he had a dwelling-house in the 24-Pergunnahs. It is now said that the defendant had transferred to other parties his rights and interests in that dwelling-house. We cannot on special appeal, enquire into this question of fact. It does not appear that this objection was

taken before the Judge. If the defendant wishes to urge any such objection now, he cannot do so on special appeal.

Appeal dismissed with costs.

The 27th March 1865.

Present:

The Hon'ble E. Jackson and F. A. Glover, *Judges.*

Inheritance—Liability of heirs for debts of ancestor.

Case No. 2333 of 1864

Special Appeal from a decision passed by the Judge of Patna, dated the 30th May 1864, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 26th February 1864.

Raj Roop Singh and another (Plaintiffs), *Appellants,*

versus

Buldeo Singh and others (Defendants), *Respondents.*

Baboo Nil Madhub Sein for Appellants.

Mr. A. F. Lingham and *Baboo Onookool Chunder Mookerjee* for Respondents.

Heirs are liable for the debts of the person from whom they have inherited to the extent of the property which they have inherited.

THE question at issue in this suit, and upon which the special appeal is preferred, is the liability to sale in execution of a decree against one Hurdeb Roy, of a certain landed estate which was purchased by Hurdeb Roy's son, Khema Singh, in the names of Khema Singh's sons. The Judge has found that Khema Singh inherited Hurdeb Roy's property, and has accordingly held Khema Singh and this estate purchased by him liable for the debts of Hurdeb Roy, until Khema Singh accounted for the whole of the property he had inherited from Hurdeb Roy. It is said that the Judge had no evidence before him upon which he could come to the conclusion that Khema Singh inherited Hurdeb Roy's property; and that the Judge should have enquired whether the money, with which this estate was purchased, was money which Khema had inherited from Hurdeb Roy, or money which he had personally acquired.

We find that Khema Singh rested his right to hold this estate on the allegation that he had inherited no property from his father Hurdeb Roy, and the Judge has found upon very clear evidence, both oral and documentary, that this allegation of his was a deliberate falsehood. The Judge was accordingly correct in recording that Khema Singh was liable, and this estate, as in his possession, was liable for Hurdeb Roy's debts, until Khema Singh gave in a full account of all monies and property to which he had succeeded as heir to Hurdeb Roy. The principle is that on which Section 203 Act VIII of 1859 makes heirs liable for the debts of the person from whom they have inherited to the extent to which they have so inherited. We think the Judge was correct in his law, and dismiss this appeal with costs.

The 27th March 1865.

Present:

The Hon'ble G. Loch and W S. Seton-Karr, *Judges.*

Lakheraj—Resumption—Limitation.

Case No. 268 of 1864.

Regular Appeal from a decision of Baboo Punchanund Banerjee, Principal Sudder Ameen of Hooghly, dated the 28th April 1864.

Khelalchunder Ghose (Defendant), *Appellant,*

versus

Poornochunder Roy and others (Plaintiffs), *Respondents.*

Mr. R. T. Allan and *Baboo Rajender Misser* for Appellant.

Baboos Banee Madhub Banerjee and Tarapersaud Mookerjee for Respondents.

Rules (as gathered from the late Full Bench decisions) laid down for the future guidance of the Lower Courts in disposing of suits for the resumption of lakheraj instituted before the date on which Act XIV of 1859 came into operation. In suits instituted after that date, the effect of Clause 14 Section 1 of that Act should be taken into consideration.

PLAINTIFFS state that they seek to resume 33 beeghas 11 cottahs 12 gundas of invalid lakheraj land in the possession of the defendant, situated within the limits of mouzah Sulkea, appertaining to their zemindary, Pergunnah Packau, Zillah Hooghly. The suit is brought under the provisions of Section 30 Regulation II of 1819.

The defendant pleads that the suit is barred by limitation, as he and his predecessors have held possession of these lands rent-free from a period anterior to the assumption of the Dewanny by the late E. I. Company; that the lands are known as the "*Feelkana,*" and were granted by the Nawab Nazim o

Bengal to Santiram Sing of Jowrasanko; that they were inherited by his son, and the property descended to his family, and it was last sold in execution of a decree of the Supreme Court on 7th May 1855, and purchased by the defendant, appellant, now in possession.

The Lower Court found for the plaintiff, holding that the defendant had failed to prove the validity of his tenure, and the Judge gave a decree for resumption, declaring the lands to pertain to *mál* land of the plaintiff's mehal.

An appeal was preferred by the defendant, the hearing of which was deferred till the result of a reference to a Bench of seven Judges (in the case of Sonatun Ghose and others special appeal No. 869; and of Hurromonee Dabea, special appeals Nos. 1290 and 1291) was made known. The reason for this reference may be shortly stated.

Previous to the enactment of Act X of 1859, suits for the resumption and assessment of land held on invalid lakheraj title, whether under Section 30 Regulation II of 1819, or Section 10 Regulation XIX of 1793, used to be brought indiscriminately, either in the Civil Court or before the Collector. It was very questionable under the law, as it then stood, whether the Collector had any jurisdiction in cases under Section 10 Regulation XIX of 1793, which related to lands alienated from a permanently settled estate subsequent to 1st December 1790. But whether the law, correctly interpreted, admitted this jurisdiction or not, the hearing of such cases, as if they were brought under the provisions of Regulation II of 1819 by the Collector, had grown into custom; and by the provisions of Section 28 Act X of 1859, the jurisdiction of the Collector was distinctly extended to these cases. By the ruling of a Full Bench in the case of Bishumber Misser, bearing date the 18th of March 1863, it was held that cases thus tried by the Collector were suits, and not summary orders; and a further question then arose whether the Legislature, when creating this new jurisdiction in the Collector, intended to take away the jurisdiction over such suits from the Civil Courts, and vest it solely in the Collector, or whether there was to be a concurrent jurisdiction in the Civil Courts and in the Collector.

Another point had to be considered. The provision of Section 28 Act X of 1859 had introduced the Law of Limitation as barring the hearing of suits under Section 10 Regulation XIX of 1793, unless instituted within twelve years from the date that the plaintiff's right of action accrued. But that law, which remained unrepealed, declared that no length of possession should give validity to such grants. If, then, there were a concurrent jurisdiction in the Civil Courts and the Collector, it was evident that, in suits brought in the Civil Courts, limitation would not apply; while in suits before the Collector, the suit would be subject to a Law of Limitation. It was further argued that one object of Section 28 Act X of 1859 was to draw a clear distinction between suits under Section 10 Regulation XIX of 1793, and suits under Section 30 Regulation II of 1819; that the latter law related only to land held as rent-free at or before the 1st December of 1790; and that a suit brought by a zemindar under the provisions of Section 30 Regulation II of 1819, was an admission on his part of the existence of the tenure in 1790, and such admission was sufficient to bar his suit, unless he were an auction-purchaser at a sale for arrears of Government Revenue. Owing, however, to the very confused state in which plaints were usually drawn up, the plaintiff claiming to resume the land as forming part of his permanently settled estate, which was a suit under Section 10 Regulation XIX of 1793, and as invalid lakheraj under the provisions of Section 30 Regulation II of 1819, it was difficult to know upon whom the *onus* of proof should be thrown. Where the plaintiff came with a distinct allegation that the lands were part of his permanently settled estates, and had been subsequently separated from it by the defendant who held it as lakheraj, it appeared but reasonable that plaintiff should start his case as in ordinary suits; but where he came in to resume under Section 30 Regulation II of 1819, the burden should be on the defendant. The practice, however, had been otherwise; and the burden of proof had always been thrown on the party claiming to hold as lakherajdar, not to prove the validity of his title, but to show that the tenure was in existence as lakheraj previous to 1st December 1790, before he could plead limitation.

These were some of the reasons which rendered a reference to a Full Bench of seven Judges necessary, and the determination of the Court may be given under the following heads:—

1*st*.—That prior to the enactment of Regulation II of 1819, the Civil Courts were competent, under their ordinary jurisdiction,

to try suits for possession under Section 10 Regulation XIX of 1793.

2nd.—That Regulation II of 1819 related only to suits for resumption of lakheraj existing prior to 1790, and that Section 30 Regulation II of 1819 did not extend the jurisdiction of Collectors to suits under Section 10 Regulation XIX of 1793.

3rd.—That by Section 28 Act X of 1859, the jurisdiction of Collectors was extended to the trial of cases under Section 10 Regulation XIX of 1793; and that from the time that law came into operation, there was a concurrent jurisdiction in the Civil Courts and in the Collector to try those cases.

4th.—That where proceedings have been instituted before 31st December 1861, *i. e.*, before the new Law of Limitation came into operation, to enforce a right under Section 10 Regulation XIX of 1793, in the ordinary Civil Courts, the Law of Limitation does not apply.

5th.—That as Section 10 Regulation XIX of 1793 applies only to grants made since 1st December 1790, the *onus* of proving that the case falls within Section 10, or, in other words, that the grant was made since 1st December 1790, and that the case is not affected by the Law of Limitation, rests with the plaintiff. He must prove that the land held by the defendant and which defendant claims to be lakheraj, is part of the *mâl* land of the plaintiff, and must shew that it was assessed with the Public Revenue at the time of the Decennial Settlement. If he prove this fact, it may be presumed that the right under which the defendant claims to hold as lakheraj, commenced subsequently to 1st December 1790, unless the defendant give satisfactory evidence to the contrary.

If the plaintiff failed to give the necessary proof, the issue as to limitation must be found for the defendant.

6th.—In cases Nos. 1290 and 1291 it was held by the Full Bench that a suit alleged to be brought under Section 30 Regulation II of 1819, must be assumed to refer only to a lakheraj created prior to 1st December 1790, and is necessarily not one to which the rule created by Section 10 Regulation XIX of 1793 of exemption from limitation applies.

7th.—That looking at the past practice of the Courts, and the peculiar circumstances under which the suits now before the Court have been brought, it was held that, if a plaintiff have erred in stating that his suit is brought under Section 30 Regulation II of 1819, and wishes to amend his plaint, he may be allowed to do so by striking out the allegation that the suit is brought under Section 30.

8th.—That, if the plaintiff amend his plaint, he must comply with the provisions of Clause 3 Section 26 Act VIII of 1859, by stating when his cause of action accrued, and if the cause of action accrued beyond the period ordinarily allowed by any law for commencing such a suit, the ground upon which exemption from the Law is claimed.

The above, therefore, are the rules as gathered from the decisions of the High Court in the cases noted in the margin, by which the Lower Courts should be guided for the future in disposing of Resumption suits.

No. 869, Sonatun Ghose, appellant; Nos. 1290 and 1291, Heeramonee Dabee, appellant.

In all cases now pending in the Courts below, the parties should be allowed to amend their pleadings with reference to the above rules.

We would further observe that the cases referred to the Full Bench were instituted previous to the coming into operation of Act XIV of 1859. That law came into operation after 31st December 1861. In all suits instituted subsequent to that date, the effect of Clause 14 Section 1 of Act XIV of 1859 on the plaintiff's suit must be taken in consideration.

We remand this case to the Lower Court to enable the plaintiff to amend his plaint if so minded, according to the rules laid down, and we direct the Lower Court to replace the suit after the amendment has been made on its own file and to proceed with it as if the plaint had originally been presented in its amended form. The Court will permit the defendant to file a fresh answer, and also allow the parties sufficient time to bring forward any further evidence they may wish to adduce.

The Weekly Reporter,

APPELLATE HIGH COURT.

No. 14.] MAY, 1865. [Vol. II.

The 27th March 1865.

Present:

The Hon'ble G. Campbell and E. Jackson, *Judges.*

Pre-emption (on ground of vicinage alone).

Case No. 2851 of 1864.

Special Appeal from a decision passed by the Additional Judge of Bhaugulpore, dated the 25th June 1864, *reversing a decree of the Principal Sudder Ameen of Monghyr, dated the 21st April* 1862.

Ejnash Kooer (one of the Defendants), *Appellant,*

versus

Sheik Amzudally and others (Plaintiffs), *Respondents.*

Mr. R. T. Allan, and *Baboos Juggadanund Mookerjee, Chunder Madhub Ghose,* and *Kallyprosunno Dutt* for Appellant.

Mr. C. Gregory, and *Baboos Dwarkanath Mitter, Unnoda Pershad Banerjee, Unnoocool Chunder Mookerjee,* and *Moonshee Ameer Ally* for Respondents.

A claim to right of pre-emption on the ground of vicinage alone, will not lie in the case of large estates, but only when either houses or small holdings of land make parties such near neighbours as to give a claim on the ground of convenience and mutual servience.

THIS is a suit on pre-emption. Several points are taken; but we have admitted for argument and shall dispose of the case on the broad ground that plaintiff's claim to right of pre-emption is bad in law and will not lie; therefore we need not notice the other points. It appears that plaintiff is owner or sharer in four villages, while the disputed property is a talook of seven villages part of which adjoins plaintiff's estate. But it is admitted that the two are wholly separate estates, separately assessed, and in no way connected. Plaintiff claims on the ground of vicinage alone. Now, it is clear that, if the Mahomedan Law does not bear out his claim, there is no other custom which does; and we are of opinion that, even supposing the Mahomedan Law, in all its integrity, to apply to the case, plaintiff's claim cannot be supported. A claim founded on joint-tenancy is, no doubt, good; but as regards vicinage not accompanied by joint-tenancy, the law is unfavorable and construes strictly such claims. The authorities are even at variance as to their admissibility; but assuming it to be settled that some claims on mere vicinage are good, the principle seems to be that, when either houses or small holdings of land make parties, in fact, such near neighbours as to give a claim on the ground of convenience and mutual servience, the claim in right of pre-emption will lie. But this principle does not apply to large estates which are not, in fact, such that any real vicinage of the proprietors results. Neither in the law nor in the decision is it shown that such a claim has ever been allowed; and the Full Bench in the case of Faqueer Rawat and others, expressed opinions altogether adverse to such claims especially in the words—"We think it pretty clear, however, that even among Mahomedans the Courts would not carry the right of pre-emption so far as this." The case also comes within the purview of the case of Nuncoo Dobe and another *vs.* Narain Doss and others, decided by the Sudder Court, North Western Provinces, on 23rd June 1856, (N. W. P. Decisions,

Volume II, page 410) and approved by the Full Bench of this Court.

We decree the appeal with costs.

The 27th March 1865.

Present:

The Hon'ble E. Jackson and F. A. Glover, *Judges.*

Government Revenue (Recovery of, paid by a mokurrureedar for his predecessor) —Excess payments.

Case No. 2378 of 1864.

Special Appeal from a decision passed by the Principal Sudder Ameen of Beerbhoom, dated the 30th May 1864, *reversing a decision passed by the Sudder Ameen of that District, dated the 24th September* 1863.

Bunwaree Kishore (Plaintiff), *Appellant,*

versus

Joy Chunder Gossain (Defendant), *Respondent.*

Baboos Sreenath Doss and *Tarucknath Sein* for Appellant.

Baboos Mohendro Lal Shome and *Obhoy Churn Bose* for Respondent.

Instalments of Government Revenue paid by a mokurrureedar on account of his predecessor, being necessary payments made to save the estate from sale, are recoverable, but not under Act X of 1859.

Payments on account of Government Revenue in excess of lease are not recoverable.

THE plaintiff in this suit is mokurrureedar of lot Shahpore, consisting of five mouzahs, having purchased the mokurruree of four mouzahs the proprietary title of which belongs to Rooknee Bullubb, and also purchased the mokurruree of the fifth mouzah the proprietary right in which belongs to Jadub Chunder Gossamee by gift from Rooknee Bullubb. The plaintiff states that, as mokurrureedar of the four mouzahs, he has paid the Government Revenue of the fifth mouzah for the year 1266, and he sues Jadub Chunder Gossamee to recover from him the sum so paid. Both the Lower Courts have dismissed his claim. It is said on special appeal, that plaintiff is entitled to recover this sum. It appears to us that he may have some right of suit against the former mokurrureedar of the fifth mouzah Parparah. He appears to have purchased that mokurruree in Magh 1266. As respects all instalments which fell due after his purchase, plaintiff was personally liable to pay the Government Revenue as standing in place of the former mokurrureedar who had contracted with Jadub Chunder Gossamee to pay the Government Revenue. Plaintiff cannot recover them from any one. As respects all instalments which fell due before his purchase, and which should have been paid by the former mokurrureedar of Parparah, but which have been paid by him as mokurrureedar of the remaining four mouzahs, plaintiff is entitled to recover them from the former mokurrureedar of Parparah. The Lower Appellate Court records that, as respects these instalments, plaintiff should sue under Act X of 1859. But here we think the Lower Court is clearly in error. The two parties do not stand in the position of landlord and tenant. The instalments which are claimed are not due as arrears of rent. They are payments made on account of the Parparah mokurrureedar by the plaintiff. It is said they are voluntary payments, and cannot be recovered; but they were necessary payments in order to save the estate from sale. It does not appear that the Parparah mokurrureedar made the payments which under his contract he was bound to make; and the whole five mouzahs of the estate would certainly have been sold, had not the plaintiff as mokurrureedar of the four mouzahs paid the Government Revenue for his neighbour, the mokurrureedar of the fifth mouzah.

As respects this portion of the plaintiff's claim, the judgment of the Lower Court is reversed, and the case remanded to the Lower Court to determine, with reference to the above remarks, whether there is any and what sum due from the former mokurrureedar of Parparah to the plaintiff for instalments of Government Revenue paid by the latter on account of the former, prior to the purchase by the latter.

The plaintiff also appeals as respects a claim which he appears to have made in the same suit against his zemindar Rooknee Bullubb, for some excess payments made by plaintiff on account of the Government Revenue of the four mouzahs which he held in mokurruree under Rooknee Bullubb. But we think that plaintiff cannot recover on this account. It was his duty to pay in the Government Revenue according to his mokurruree lease. If he paid in more than he ought, he must bear the loss, if it is a loss; but we suppose that, under such circumstances, the excess would be credited to the revenue of the following year. We dismiss the appeal on this ground.

The appellant will pay the the costs of all the respondents in this appeal, except those of the former mokurrureedar of Parparah, and the liability of his own costs and those of the former mokurrureedar of Parparah will be determined by the Lower Court on the decision of the dispute as between them.

The 27th March 1865.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Sections 246 & 247 of Act VIII of 1859—Limitation—Redemption.

Case No. 314 of 1864.

Regular Appeal from a decision passed by the Judge of Patna, dated the 28th May 1864.

Syed Mahomed Afzul (Plaintiff), *Appellant,*

versus

Kanhya Lal and others (Defendants), *Respondents.*

Mr. R. E. Twidale and *Baboo Onoocool Chunder Mookerjee* for Appellant.

Mr. R. T. Allan for Respondents.

Suit laid at Rupees 48,647-13 annas.

A claim to property about to be sold in execution of a decree, was made under Section 246 of Act VIII of 1859, but the Court declined to entertain it, and passed an order under Section 247 disallowing the investigation.

HELD that the claimant in bringing a regular suit to prosecute his claim was not, either by any provision of Act VIII of 1859, or by Clauses 3 or 5 of Section 1 of Act XIV of 1859, bound to institute his suit within one year from the date of the order disallowing the investigation.

THE only question which we have to decide in this case, is whether the Lower Court is right in holding that appellant's (plaintiff's) suit is barred under Sections 246 and 247 of Act VIII of 1859, and Clause 3 Section 1 of Act XIV of 1859.

The plaintiff sues to redeem a zur-i-peshgee mortgage. He makes title to the lands which are the subject of the mortgage, under a purchase by him of the rights of one Byjnath, at a sale held in 1849 in execution of a decree against Byjnath. In 1861 the rights of Byjnath in the same lands were again sold in execution of a decree, and the defendant Rughoonath purchased them. On the day of this latter sale, the plaintiff preferred a claim under Section 246 of Act VIII of 1859, stating that whatever rights remained in Byjnath had been purchased by him (plaintiff) in 1849. The Court, exercising the power given it by Section 247, refused to investigate the claim, or to stay the sale, recording that the petition had not been presented till after the commencement of the sale, and was put in merely for the purposes of delay.

It is contended that the present suit is one in which the plaintiff cannot succeed without practically setting aside the order made under Section 247; and that, as that is a summary order within the meaning of Clause 5 of Section 1 of Act XIV of 1859, no suit to set it aside will lie unless institute within one year from the date of the order. It is also contended that the object to the suit was to set aside the sale to Rughoonath, which was a sale made in execution of a decree; and that consequently under Clause 3 of the same Section, the suit would not lie if instituted more than a year after the date of the sale. The plaintiff, on the other hand, submits that he does not sue to set aside, and has no desire to set aside, either the sale to Rughoonath or the order of Court under Section 247; that the title which he sets up is paramount to Rughoonath's, and under that title he has a right to redeem whether Rughoonath did or did not buy any thing at the sale in 1861; and that, therefore, only the general law of limitation can apply to the case, and not the special rules pleaded.

In our opinion the plaintiff's suit is not barred because it was not instituted within one year after the date of the sale to Rughoonath, and the order under Section 247. It is clear that, if the plaintiff can prove his case, he will prove a title to redeem as against which Rughoonath will have no title whatever to show.

At the sale in 1861 the plaintiff's application was rejected under Section 247, and his rights were in no way either enquired into, or adjudicated upon; and the only legal effect of the order of rejection was to refuse him the benefit of a summary investigation under Section 246. We have been urged to read Sections 246 and 247 together, and to hold that these Sections impose the same limitation of one year in cases where investigation is refused under Section 247, as is undoubtedly imposed in cases where there has been a summary investigation under Section 246. But, we think, we ought not to construe them as laying down that, if an investigation is refused under Section 247, the claimant, if he wishes to prosecute his claim by regular suit, can do so only within one year from

the date of the order refusing the investigation. A case in which the claim made has been summarily enquired into and decided, is very different from a case in which the Court simply refuses to make any enquiry, or pass any decision at all. Moreover, a law limiting the period within which suits may be brought is to be construed strictly; and where the Legislature has not expressly limited the time for suing, this Court will not readily (if it will under any circumstances) prescribe a limit merely because there is reason to infer that the Legislature intended to prescribe that limit, although it has accidentally omitted to do so. As the plaintiff really does not sue either to set aside the sale of 1861, or the order which was made under Section 247, neither Clause 3 nor Clause 5 of Section 1 of Act XIV of 1859 is applicable.

The decision of the Lower Court is reversed, and the case must be remanded for trial on the merits. In disposing of the case on the merits, the Court must enquire and decide with the utmost care and decision what were the exact nature and extent of the rights (if any) of Byjnath, which are alleged to have been purchased by the plaintiff in 1849. It is evident that everything must turn upon that question. It may be too that the Court will have to consider whether the plaintiff's suit is barred by the general law of limitation. Remand accordingly.

The 27th March 1865.

Present:

The Hon'ble H. V. Bayley and G. Campbell, *Judges.*

Joint Hindoo Family—Estoppel—Onus probandi.

Case No. 346 of 1864.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Nuddea, dated the 16th February 1864.

Surnomoyee Debia, Pauper, (Plaintiff), *Appellant,*

versus

Gunga Gobind Roy and others (Defendants), *Respondents.*

Baboos Mohendro Lal Shome and *Roopnath Banerjee* for Appellant.

Baboos Kishen Kishore Ghose, Mohesh Chunder Chowdhry, and *Onookool Chunder Mookerjee* for Respondents.

Suit laid at Rupees 15,563-4as.-1g. 2c.

Suit for share of joint ancestral property. The plaintiff claims under A, who, when sued in 1812 as trustee for the defendant's father then a minor, never pleaded that he was a co-parcener. HELD that the plaintiff, if not estopped from now contending that the property is joint, has still the full burden of proving that it is joint.

IN this case plaintiff Surnomoyee Debia, as widow of Ram Gobind Roy, and in behalf of herself and minor sons, sued various members of her husband's family and others as co-parceners for a four anna share of the joint ancestral property of her husband. Plaintiff alleged that her husband had had possession jointly with defendants till his death on 6th Agrahun 1265 B. S.; that, after that, plaintiff, as his widow, held possession jointly with defendants; but that, on the 28th Assar 1267 B. S., defendants ousted her.

Defendants Gunga Gobind and Bhugwan Chunder answered, denying that they had ever ousted plaintiff, and averring that each of them also had been ousted from a four anna share of the ancestral property. They also pleaded that portions of the property sued for by plaintiff were self-acquired and not joint.

The answer of the principal defendants, Ram Tarun and others, was to the effect that the estate of Doorlubpore was originally the self-acquired separate property of the grandfather Odoyto Mohun Roy; that then this defendant's father Lokenath had it through his guardian; and on Lokenath's death in 1266, his son (defendant Ram Tarun) and the mother and guardian of his minor nephew held it; further, that they held in the same way, as separate property, other mehals settled with them, and that trade, rent-free lands, granaries, &c., were also the separate and *self-acquired* property of this defendant's grandfather and father. Limitation by adverse possession of more than 12 years was pleaded as to this alleged self-acquired property; and as to the rest that defendant had never dispossessed plaintiff, and that all the heirs held their rightful shares.

The Principal Sudder Ameen, Baboo Roy Nobo Kishen Paleet, put in issue:—*firstly,* whether limitation barred the suit; *secondly,* was plaintiff in possession, and dispossessed, as she alleged? *thirdly,* how far is the averment of the defendant, Ram Tarun, as to the

property having been self-acquired and not joint, correct?

In respect to the *first* and *second* issues, the Principal Sudder Ameen held that limitation could not bar the suit if the property were joint. But, on the last question, he found that plaintiff never proved her possession of it as joint, and that plaintiff had not adduced any documentary evidence to prove her allegations on this point. The Principal Sudder Ameen also found that the grandfather, Odoyto Mohun Roy, appointed his brother, who was also plaintiff's father-in-law, Brij Mohun Roy (the father with two others) to be his executors; that Brij Mohun as executor was sued by their heirs for possession of the landed estate when he executed a conditional sale of it; and that in that suit it was claimed as self-acquired property of defendant's father Lokenath; but that Brij Mohun then never put forward any plea to the effect that it was *joint*-property. The Principal Sudder Ameen also remarked that defendant's father Lokenath was registered as the *sole* proprietor—in fact, that it was not joint property at the time of that suit (1812), and had been held as self-acquired and separate, *i. e.*, adversely, since then by defendant Ram Tarun and his father Lokenath, and that consequently limitation barred the suit. The Principal Sudder Ameen also held on the issue of possession and right of co-parceny in regard to the trade, rent-free, and granary, that these were not joint and that plaintiff still had possession of what was her joint share, and had never been ousted from it.

The Principal Sudder Ameen accordingly dismissed plaintiff's suit, and plaintiff has appealed to this Court.

The pleader for the appellant has before us contested the justice of the decision below, *mainly* on *three* grounds:— 1*st*, that this was admittedly one of a Hindoo family in its ordinary *status*; that the ordinary *status* of such a family was always presumed to be joint, unless the contrary were shown by parties disputing the fact; that here the defendant admitted that plaintiff was entitled to, and held possession of, certain of the properties sued for by plaintiff as in *joint*-family and co-parceny; and that the whole burden of proving that defendant had any title to them by self-acquisition was on defendant; whereas, the Principal Sudder Ameen had dismissed plaintiff's suit on plaintiff failing to prove his allegations; that, till the self-acquisition alleged by defendant had been fully proved, which it had not been in this case, it was the duty of the Principal Sudder Ameen to follow the law and consider the possession of any one in a joint-Hindoo family, as the possession of all or of a trustee for all the co-parceners; *lastly*, that, although no documentary evidence had been adduced by plaintiff to prove his allegations as to co-parceny and joint-family, the very pleadings of the defendants, and the testimony of Ram Tarun himself, shewed the fact.

On the other hand, it was contended, that plaintiff having alleged possession and dispossession, was bound to prove, these allegations in the first instance; and that if she failed in that, her suit as laid should be dismissed; that there was no evidence adduced by plaintiff to prove these allegations; that defendant did adduce evidence to show that the only properties of which plaintiff had not possession where the self-acquired separate property of defendant's father and grandfather; and that Brij Mohun, plaintiff's father-in-law, and brother and executor of the defendant's grandfather Odoyto Mohun Roy, never questioned defendant's father Lokenath's property to be separate and self-acquired when he was sued in 1812, which he never would have done, had it not been the case, for he was then being sued as executor in tort, and would naturally have pleaded a co-parceny to help his case, if such co-parceny were the fact.

After a careful consideration of the arguments of the Counsel, and the facts of the case as shewn by the record, we are of opinion that, although plaintiff's contention is so far correct that a Hindoo family is legally presumed to be joint till the contrary be proved, and that in it all who plead separate acquisitions have the burden on them of proving their averments, still, in this case, we hold that really the defendant has *primâ facie* rebutted the presumption sufficiently to shift back upon plaintiff the burden of proving his allegations of possession and dispossession, and of showing that he, plaintiff, is not estopped by the act of Brij Mohun, the father and executor of the grandfather; and the father-in-law of plaintiff from contending that the talook and those other properties of which plaintiff's possession is not admitted and found, and are joint.

It is quite clear that, when Brij Mohun was sued in 1812 for misappropriating the funds of the talook, he was sued as for property of the then minor, defendant's father Lokenath. Brij Mohun never then pleaded

that he was a co-parcener and not a trustee, which he certainly would if the former had been his position. Plaintiff derives from Brij Mohun, and we are of opinion that, under these circumstances, plaintiff, if not estopped from now contending that the property is joint, has still the full burden of proving that it is joint, with the addition of the conduct of Brij Mohun being a very strong evidence against plaintiff's claim.

In this view, we come to look upon the evidence which plaintiff adduces, and we find no independent documentary evidence to prove that the property which defendant states was self-acquired, was joint, as alleged by plaintiff; and we also find that plaintiff does not prove her possession and dispossession from it, or of the other property she says she has been dispossessed of. The pleader refers to the evidence of Ram Tarun as shewing joint-family. His evidence is clear as to defendant's having the separate self-acquired talook and does not help plaintiff as to that property being joint. This witness only says that plaintiff is in possession of the other joint-property of which plaintiff alleges dispossession.

On the whole case, we see no reason to reverse the order of the Lower Court. We accordingly dismiss this appeal with costs.

The 29th March 1865.

Present:

The Hon'ble G. Lock and W. S. Seton-Karr, *Judges.*

Limitation—Reimbursement—Joint decree—Private arrangement between one judgment-debtor and decree-holder.

Case No. 330 of 1864.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Backergunge, dated the 18th June 1864.

Doorga Monee Dossee and others (Defendants) *Appellants,*

versus

Doorga Mohun Doss and others (Plaintiffs), *Respondents.*

Baboos Banee Madhub Bannerjee, Romanath Bose, and *Bungshee Buddun Mitter* for Appellant.

Baboos Dwarkanath Mitter, Unnoda Pershad Bannerjee, Chunder Madhub Ghose, Hem Chunder Banerjee, Mohinee Mohun Roy and *Onoocool Chunder Mookerjee* for Respondents.

Suit laid at Rupees 10,000.

The limitation prescribed by Clause 16 Section 1 Act XIV of 1859 is applicable to a suit for reimbursement of rateable shares of a joint decree.

A judgment debtor cannot make a private arrangement with the decree-holder, and urge that the latter exonerated the former from payment of any portion of a joint decree.

THE facts out of which this appeal arises are as follow:—

One Mahomed Hohsin obtained two decrees for arrears of rent against Gooroo Pershad Sein, Gokul Narain, and others, on account of a tenure held by them. These decrees appear to have been, in part, satisfied at various intervals in and after the year 1257. But a balance remained out of the unpaid amount together with costs and accumulations of interest, which amounted to Rupees 14,444.

The plaintiffs, who have admittedly bought the right to sue for reimbursement from certain of the defendants who had liquidated the whole debt, now institute the action for the sum of 10,000 Rupees, after making certain deductions from the whole amount of the debt which, it is seen, had amounted to 14,444 Rupees.

Several of the defendants made no appearance in the Lower Court, and were condemned, in their rateable shares, to the extent of Rupees 7,121-4-9. As they have not appealed, there is an end of this part of the case, and the only point we have now to consider is the appeal of the defendant, Doorga Monee, who represents a share in the tenure of $3\frac{1}{2}$ annas, and who has been cast in the sum of Rupees 2-878-11-3.

On the first point pleaded, *i e.*, limitation, we are clearly of opinion that there is nothing to bar the action. It is pleaded that the action should have been brought under Clause 9 of Section 1 Act XIV of 1859, which prescribes the limit for actions for breach of contract and money had and received. But we hold that the proper Clause is Clause 16, for cases not comprised within the previous Clauses, which allows a limit of 6 and not of 3 years, and that the Legislature never contemplated that actions such as the present should be instituted under Clause 9.

This point being decided against the appellant, the only other point that remains is whether she can claim a set-off of 1,450 Rupees, or whether she has been rightly cast in the full sum of Rupees 2,878-11-3.

On this point we think the Lower Court has, in the main, decided correctly. The appellant cannot claim to have this sum deducted entirely in her favor, though she may have paid such an amount to the decree-holder; but, in any view, the defendant has no right to make an entirely private arrangement with the decree-holder, or to urge that the said decree-holder exonerated her from payment of any portion of a joint decree.

There is also some error in the figures in this case. The sum due from the appellant, out of 10,000 rupees for her share of 3½ annas would be, not rupees 2,878-11-3, but 2,187-8, and for this she must be liable. On the other hand, she will be entitled to credit for a 3½ anna share in the sum of 1,450 rupees which was realized by the decree-holder, as against the plaintiff who has bought the right to reimbursement from the other sharers.

The decree must, then, be amended to the above extent. The sum leviable from the defendant will be rupees 2,187-8 minus a sum which shall represent 3½ annas in a total of 1,450 rupees, with interest on both sums to be calculated from the date of payment in either instance. Costs in proportion.

The 27th March 1865.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges*.

Jurisdiction—Suit to set aside order of Magistrate for removal of local nuisance.

Case No. 367 of 1864.

Regular Appeal from a decision passed by Mr. Rivers Thompson, Judge of Nuddea, dated the 28th June 1864.

Kadernath Mookerjee (Plaintiff), *Appellant*,

versus

Parbutty Peishker (Defendant), *Respondent*.

Mr. R. E. Twidale for Appellant.

Baboo Mohesh Chunder Chowdhry for Respondent.

A Civil suit will not lie to set aside an order of a Magistrate for the removal of a local nuisance under Act XXI of 1841 or under Section 308 of the Code of Criminal Procedure.

We think that this appeal must be dismissed and with costs. But we dismiss the appeal without entering into the merits of the case, as, in our opinion, the suit is one which no Civil Court had jurisdiction to entertain. The object of the suit is to cancel two orders of the Magistrate—the one passed under Act XXI of 1841, and the other under Section 308 of Act XXV of 1860—restraining the plaintiff from closing a certain public path-way. A Civil suit will not lie to set aside an order under Act XXI of 1841. *See* Ramroodra Surma *versus* Prankishen Surma, decided by this Court on December 10th 1862 (2 Hay's Reports page 86); also Government *versus* Chorumlall, S. D. A. Rep. 1853, page 929; and Government *versus* Syed Gazee Nisher Ali, S D. A. Rep. 1855, page 265. Under these circumstances, the Lower Court should have dismissed the suit without deciding on the merits.

Appeal dismissed with costs.

The 29th March 1865.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges*.

Mortgage—Equity of Redemption—Ejectment of persons long in possession—Onus probandi.

Regular Appeals from a decision passed by the Judge of Patna, dated the 24th June 1864.

Case No. 363 of 1864.

Ashruffoonissa Begum (Defendant), *Appellant*,

versus

Rughoonath Sohoy and others (Plaintiffs), *Respondents*.

Baboos Dwarkanath Mittr and *Onoocool Chunder Mookerjee* for Appellant.

Mr. R. T. Allan and *Moulvie Murhamut Hossein* for Respondents.

Case No. 370 of 1864

Kanhya Lal (Defendant), *Appellant*,

versus

Rughoonath Sohoy (Plaintiff), *Respondent*.

Baboo Debendro Narain Bose for Appellant.

Mr. R. T. Allan for Respondent.

Case No. 371 of 1864.

Baboo Gobind Pershad and others (Defendants), *Appellants*,

versus

Rughoonath Sohoy (Plaintiff), *Respondent*.

Baboo Sreenath Doss for Appellants.

Mr. R. T. Allan for Respondent

Case No. 372 of 1864.

Teknarain Singh (Defendant), *Appellant,*

versus

Rughoonath Sohoy (Plaintiff), *Respondent.*

Boboo Roopnath Banerjee for Appellant.

Mr. R. T. Allan for Respondent.

Suit for possession of property mortgaged under a zur-i-peshgee lease, instituted by a purchaser of the rights of the heirs of A to whom the rights of the original owner alleged to have been transfered several years ago by a sale in execution of a decree. HELD that before the plaintiff was entitled to a decree, he was bound to prove that the mortgage still existed, and that he was entitled (as representative of A's heirs) to the equity of redemption, and to possession on payment of what remained due.

When a plaintiff sues to eject those who have been long in possession, the *onus* is on him to prove a strict legal title.

THESE are four appeals from a decree made in a suit brought by the respondent Rughoonath Sohoy for the possession of certain landed property. The property in question was mortgaged (*i. e.* a zur-i-peshgee lease was granted) in 1824 to Seetaram Sohoy, by the owner Afzulunissa Begum, whose rights are now represented by the appellants Teknarain and Ashruffoonnissa Begum. The appellant Kanhya Lal now represents the mortgagee Seetaram: while the respondent Rughoonath claims as purchaser of the rights of the heirs of Byjnath Sohoy to whom the rights of the original owner Afzulunissa are alleged by Rughoonath to have been transferred many years ago by a sale in execution of a decree. The suit is for possession, and to recover from the mortgagees certain sums which they are stated to have received in excess of what they were entitled to under their mortgage. The respondent Rughoonath's title is based on a purchase made by him in 1861 of the rights and interests of the heirs of Byjnath in this property, which rights and interests were then sold in execution of a decree against Byjnath's representatives.

The defence is that, when Rughoonath purchased in 1861, he bought nothing, Byjnath's heirs having then no interest whatever in the property. The mortgagees also deny being in possession, pleading that they were in 1265 dispossessed under a decree of the 14th September 1854 made in a suit which was brought by the representative of Afzulunissa for possession of the property and redemption of the mortgage.

The lower Court gave the plaintiff a decree for an account of what was due on the mortgage, with an order for possession if nothing should (on taking the account) be found to be due, or an immediate payment of the balance due from them if any balance should be found still due. The present appeals are from this decree.

We are of opinion that the decision of the Lower Court ought to be reversed and that the plaintiff's suit ought to be dismissed. Before he could be entitled to a decree, the plaintiff had to prove that the mortgage still existed, and that he, as occupying the position of the heirs of Byjnath, was entitled to the equity of redemption, and the right to obtain possession on payment of what (if any thing) remained due. And before he could prove his right to redeem this mortgage, or to obtain possession of this property, he must shew that the heirs of Byjnath had that right at the time when he (Byjnath) in 1861 purchased their rights and interests at the execution sale. It appears to us that the plaintiff has not proved that the heirs of Byjnath had any such rights in the property in 1861, and that he has not proved that the mortgage of 1824 is still in existence, or that possession is held under it by the appellants who represent the original mortgagee.

The title put forward by the plaintiff is of the most indefinite description, and it is quite impossible to make out on what, in particular, he relies as giving him the rights which he now claims. Certainly, no legal title to the ownership of this property is set forth in the very confused judgment of the Lower Court, although the Judge does, "find that at the "time of the sale the heirs of Byjnath "were actually in possession, and that as "plaintiff has succeeded to their position, he "can sue for possession by cancellation of "the subordinate tenure, on the ground that "all claims under it have been satisfied by "the usufruct." It may be remarked that it does not necessarily follow that, because "at the time of the sale the heirs of Byjnath were actually in possession" (if such had been proved to be the case,) the plaintiff, as succeeding to their position, could sue to redeem this mortgage.

Before the fact of his succeeding to the position of Bynath's heirs would entitle the plaintiff to redeem, it would be incumbent on him to shew that the equity of redemption was in the heirs of Byjnath when he purchased their rights. And, that this was so, the plaintiff Rughoonath, in our view of the case, wholly fails to shew. We do not think that the purchaser of the rights of a judgment-debtor in an estate is entitled to a decree for redemption and possession, unless he is

able to prove a very much better title than that which the Lower Court has, in this instance, taken to be sufficient. No real title is, in fact, shewn, to exist, and the Judge seems to have been satisfied with the mere fact that, rightly or wrongly, the heirs of Byjnath were in possession in 1861, the fact of which possession, however, we do not think is established. The Judge gives the following reasons for deciding in the plaintiff's favor:—"Byjnath appears to have continued in possession subject to ouster at any "moment, and, until ousted, he could exercise the rights of a proprietor, or, at any "rate, not directly adverse to Mahomdie's title, and his right of occupation has "passed by the auction-sale to plaintiff; I do "not think that I can, in this suit, expressly "determine whether Jhubha Begum (*alias* "Ashruffunnissa Begum) retains a right of "re-entry; all I have to do, is to find whether at any time before the sale to plaintiff, "she had enforced this right. I find that she "had not done so, and I must, therefore, place "the plaintiff in the position of the heirs of "Byjnath. If they were competent to "receive rents under a lease, they were competent to prove that the lease had expired, "and to collect the rents directly from the "ryots; and consequently this action is "maintainable.

"Defendant contends that Byjnath's interest was only of a pecuniary nature, and "that this was all that plaintiff could purchase, and that this conveys no proprietary "title. Granting that to all appearances "Byjnath's proprietary title was extinct, and "even that his claims on the estate had been "satisfied in full, still the facts remain that "rightfully or wrongfully he retained possession, and that plaintiff is entitled, by "virtue of his auction-purchase, to be put "in the exact position of Byjnath. When "the original auction-sale was cancelled by "the decree of 1837, the former proprietors "regained their rights of proprietorship by "the proceeding of 9th December 1847; "actual possession was re-transferred as to "the greater portion of the property now in "dispute. The fact of this re-transfer in "the one case implies the necessity of it in "the other. Now, it is not shown that, by "any formal order or private contract, Mahomdee ever recovered possession; and all "that I can now say for defendant is that "she has the same right (subject to the Law "of Limitation) to oust plaintiff that Mahomdee had to oust Byjnath, and no more "effect can be given to this right in this suit."

We cannot concur in the legal conclusion at which the Judge seems to have arrived. He has overlooked the important point that the plaintiff comes into Court suing to eject those who are in possession, and who have been many years in possession; and that it is upon him to prove a strict legal title to the relief he seeks.

On the evidence it appears that, prior to 1830, the rights and interests of Afzulunnissa in this estate were sold, and Golam Nubby purchased them. Golam Nubby sold to Byjnath, who got possession and sold to Prankishen Mitter. Subsequently (at the suit of Rowshun Begum and Mahomdee Begum, the then representative of the original proprietor Afzulunissa) the sale to Golam Nubby was set aside by the Sudder Court in 1837. It would seem that, notwithstanding that the sale was thus set aside, Byjnath and his representatives continued in possession under an arrangement relating to the refund of a portion of the purchase-money which had been paid. The terms of this arrangement are not before us, and the pleaders who have argued this appeal are unable to inform us what these were: and it is not even clear whether the arrangement was made with Byjnath and his heirs, or with Prankissen Mitter to whom Byjnath had, prior to the sale proceedings being set aside, sold his rights. It is, however, admitted that Byjnath and his heirs, or Prankissen, did, for a time, remain in possession. In 1847, the heirs of Prankissen sued to recover possession. Byjnath was then dead, and his estate was in the hands of the Court of Wards. The Collector, on behalf of the estate, filed an answer stating that Byjnath's interest in the property ceased and determined on his sale to Prankissen Mitter, since which time he had never received any rents; and the answer also stated that, although the property in suit had been originally included in the schedule of properties appertaining to Byjnath which had come under the management of the Court of Wards, no collections had ever been made on account of it; and that in 1842 it had been, by order of the Sudder Board of Revenue, struck out of the schedule. The suit of the heirs of Prankissen was eventually dismissed by the Sudder Court in 1852. They pleaded that Mahomdee Begum had, subsequent to the reversal in 1837 of the sale under which Byjnath claimed, agreed to acknowledge Prankissen's title. But the Sudder Court held that the suit would not lie, for that, after the reversal in 1837 of the

sale proceedings, Byjnath ceased to have any rights in the property, and therefore Prankissen also ceased to have any rights in it. Prankissen's heirs subsequently sued to recover the money paid by Prankissen to Byjnath; but the suit was dismissed as being barred by limitation, and the decision was confirmed by the High Court on 14th August 1863. In 1854, the appellants Teknarain and Ashruffoonissa, representing the original owner Afzulunissa, sued for possession, the representatives of Byjnath and of the mortgagees being defendants. The suit was instituted in the Court of the Principal Sudder Ameen, and was decided in favor of the then plaintiffs, who got a decree on 15th September 1854, and allege that they also got possession under it in 1265. That decree was not appealed from, and it is consequently difficult to see how in 1861 any rights in this property could remain in the representatives of Byjnath. The plaintiff in the present suit, however, attempts to get over this difficulty by putting in evidence certain orders of the Sudder Court of later date permitting the rights and interests of the heirs of Byjnath to be put up for sale, on the ground that they were still in possession. The plaintiff more especially relies on a Miscellaneous Order of the Sudder Court of 7th August 1855, by which a sale of the rights of Byjnath's heirs was allowed to go on, although objected to by Ashruffunissa; who pleaded the decree above referred to obtained by her from the Principal Sudder Ameen's Court in 1854. We do not, however, think that this order of the Sudder Court assists the plaintiff, because it was made in the belief that the heir of Byjnath had not been a party to the suit before the Principal Sudder Ameen, whereas, in truth, he was a party in that suit and was bound by the decree made in it. This mistake as to the heirs of Byjnath not being bound by the decree in the case in the Principal Sudder Ameen's Court in 1854, is probably the origin of all the subsequent proceedings on which the plaintiff Rughoonath relies, and, we, therefore, especially as they were only Miscellaneous Orders, do not consider them as binding or affecting the rights of which the parties obtained a declaration in the Principal Sudder Ameen's Court.

On the whole, bearing in mind that the sale under which Byjnath claimed was set aside in 1837; that before it was set aside, he had sold all his rights to Prankissen; that there is no distinct or reliable evidence as to who actually remained in possession after 1837; that in 1842 the Board of Revenue caused the lands to be struck out of the schedule of properties belonging to Byjnath's estate; that in 1847 the Collector, acting for the estate of Byjnath, disclaimed all interest in the property; and that in 1854 a competent Court gave a decree to the appellants Teknarain and Ashruffoonnissa for possession against the heirs of Byjnath and the representatives of the original mortgagee; we are very clearly of opinion that the respondent Rughoonath has wholly failed to prove his title to this property. We also think he has not proved that the representatives of the mortgagee are in possession, or that the mortgage is still unredeemed.

The decree of the Lower Court is reversed and the suit is dismissed with costs.

The 29th March 1865.

Present:

The Hon'ble G. Campbell and E. Jackson, *Judges.*

Farming lease (by guardian of minor).

Case No. 3166 of 1864.

Special Appeal from a decision passed by the Principal Sudder Ameen of Zillah Hooghly, dated the 4th July 1864, *affirming a decision passed by the Sudder Ameen of that District, dated the 20th April* 1860.

Huro Mohun Mookerjee (Plaintiff), *Appellant,*

versus

Kaleenath Mookerjee and others (Defendants), *Respondents.*

Baboo Roopnath Banerjee for Appellant.

Baboo Hemchunder Banerjee for Respondents.

The *bonâ fide* act of a guardian for the benefit of a minor's estate, in giving a farm of the estate, is not one which a Court ought to to set aside except for strong reasons.

THIS was a suit to set aside an ijara lease on the allegation that it was granted by the guardian of the plaintiffs while the plaintiffs were minors, and that the plaintiffs having attained majority, it has no longer any legal effect.

The Judge below has upheld the ijara, and it is, on special appeal, again contended that it must be set aside.

We think that the *bonâ fide* act of the guardian for the benefit of the estate of the minors in given out that estate in farm for a certain number of years, is not one which a Court ought lightly to set aside. More reasons are given for the granting of the farm, and money was raised upon it, which the Lower Court considers was taken for the minors' use. These are sufficient grounds for upholding the guardian's acts.

We dismiss this appeal with costs.

The 30th March 1865.

Present:

The Hon'ble G. Campbell and E. Jackson, *Judges.*

Debts of former owners—Liability of new owners.

Case No. 2915 of 1864.

Special Appeal from a decision passed by the Judge of the 24-Pergunnahs, dated the 25th July 1864, *affirming a decision passed by the Second Principal Sudder Ameen of that District, dated the 24th December* 1863.

Moonshee Lutafut Hossein and others (Plaintiffs), *Appellants,*

versus

Mr. R. H. Young and others (Defendants), *Respondents.*

Mr. J. Baptist for Appellants.

Mr. A. F. Lingham for Respondents.

A debt not being a lien on the property sold, the purchaser was held to have acquired the property free from liability for the debt.

It is plainly stated by the Court below that the first attachment was taken off, and it is not one of the grounds of appeal that this attachment is wrong (in fact it appears to be right); therefore we must accept that state of facts.

The only ground of special appeal urged on those facts, is that there must be considered to be a lien on the indigo factory for the wasilat of the lands unjustly appropriated by the former owners of the factory, and that the new owners are liable. But in the absence of either an attachment prior to sale not taken off, or of proof of the acceptance by the new owners of the liability, it is clear to us that there is no lien and no liability of the new owners (who have bought a property not in the custody of the law with no special acceptance of special liabilities) in a case where the debt is not one which the law attaches as a lien to the property now in dispute. The plaintiff has obtained possession of his property, and he seeks to make other property subject to lien for his wasilat, which under ordinary circumstances, he cannot do.

The expressions of the Judge regarding the right of plaintiff to dispute the fact of sale, and the effect of a continous attachment, are not very intellgible to us; but no special appeal on these points is urged. We dismiss the appeal with costs.

The 31st March 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr *Judges.*

Regular Appeals from a decision passed by Baboo Koylash Chunder Deb Roy, Principal Sudder Ameen of the 24-Pergunnahs, dated the 29th February 1864.

Jurisdiction (Property situate in two Districts)—Limitation (Sale by Hindoo Widow).

Case No. 178 of 1864.

Moonshee Syed Ameer Ali (one of the Defendants), *Appellant,*

versus

Mohendronath Bose (Plaintiff), *Respondent.*

Mr. R. E. Twidale for Appellant.

Baboos Onoocool Chunder Mookerjee, Baneenath Bose and Dwarkanath Mitter for Respondent.

Case No. 179 of 1864.

Behaus Coomaree (one of the Defendants), *Appellant,*

versus

Mohendronath Bose (Plaintiff), and Motee Soonduree Dossee (Defendant), *Respondents.*

Mr. R. T. Allan and *Baboos Kishen Kishore Ghose* and *Unnoda Pershad Banerjee* for Appellant.

Baboos Onoocool Chunder Mookerjee Baneenath Bose and *Dwarkanath Mitter* for Respondents

Case No. 180 of 1864.

Suhodara Bibee (one of the Defendants), *Appellant,*

versus

Mohendronath Bose (Plaintiff), *Respondent.*

Baboo Kishen Succa Mookerjee and *Bhuggoobutty Churn Ghose for* Appellant

Baboos Onoocool Chunder Mookerjee, Baneenath Bose and *Dwarkanath Mitter for* Respondent.

Suit laid at rupees 2,82,544-4 annas.

A suit was brought for property situated in Districts A and B, and the Principal Sudder Ameen of A was permitted by the Sudder Court to try the suit for the whole. Pending the suit, the plaintiff withdrew his claim as to the property situate in A. HELD that the Principal Sudder Ameen of A had still jurisdiction to proceed with the suit as to the property in B.

A reversioner cannot, during the life-time of a Hindoo widow, sue to set aside a sale made by her if 12 years have elapsed since the date of the sale, though he may, during her life-time, sue to have the sale declared void and to prevent waste. Such limitation does not affect the right of suit of the reversioner after the widow's death when he succeeds as heir.

PLAINTIFF, as reversionary heir of the late Russick Lall Mitter, brings his action against his widow Motee Soonduree to remove her from the management of her deceased husband's property, on the charge of waste, and to set aside certain sales and leases made by her in favor of the other defendants, which the plaintiff alleges to be detrimental to the interests of the reversioners, injurious to the estate of the deceased, and made without any necessity, such as is contemplated and allowed by the Hindoo Law as justifying and giving validity to the alienation of family property by a Hindoo widow in possession. The special waste complained of by the plaintiffs in their written statement is the cutting down of trees, &c., by the ticcadars.

Motee Soonduree, the principal defendant, denies the allegation of wasteful living, but admits that she has sold certain property for necessary purposes, and that other property has been sold in execution of decrees against her for purposes connected with her husband's estate.

The facts of the case, as we gather them from the pleadings, are as follow; and we may observe that they are not denied by the plaintiff, and scarcely admit of denial. On the death of Roy Russick Loll Mitter, his widow Motee Soonduree was dispossessed by his cousin Prankisto Mitter, with whom she was obliged to enter into litigation to enable her to recover possession. For this purpose she borrowed money from the house of Bechun Lol and Brijo Lal Oopadhya, and brought a suit in the Supreme Court, and obtained possession under a decree of that Court. She was subsequently sued by Bechun Loll (now represented by his widow Behaus Coomaree) and Brijo Lal for the money lent to her by them, and in satisfaction of their decree for rupees 1,57,401 a portion of the property belonging to Motee Soonduree was attached. To save it from sale, Motee Soonduree came to terms with the decree-holders, and, on 8th May 1844, gave them a ticca lease of certain talooks for nine years, with the condition that, if the sum due were not realized in the course of nine years, the lease should be continued for another period of nine years, and so on. Motee Soonduree, after having given possession to her judgment-creditors, subsequently evicted them. This led to an action under Act IV, in which the judgment-creditors were unsuccessful, and they then brought a suit in the Civil Court to set aside the award under Act IV, and to recover possession, and obtained a decree from the late Sudder Court on the 27th March 1848. Motee Soonduree filed a fresh suit in the Lower Court in 1850, and recovered possession; but this order was set aside, and the judgment-creditors restored to possession under a judgment of the Sudder Court dated 30th April 1857. In 1856, Motee Soonduree tried again to recover possession on the allegation that the money due to the creditors had been realized by them; but this case was dismissed on 7th December 1857, and a large sum was found to be then due to them. A further suit for the same purpose, and on the same grounds, brought by Motee Soonduree, was dismissed on 27th December 1861.

It is stated to us that when Motee Soonduree ejected the judgment-creditors, Brijo Lal and Bechun Lal Oopadhya, she let part of the property covered by the ticca lease previously given to her judgment-creditors to Seud Ameer Ali; that when they recovered possession under their decree, Ameer Ali was evicted by process of law, and brought an action against Motee Soonduree to recover the sums advanced by him on his lease, and under his decree sold and purchased the various properties mentioned in his written statement.

Motee Soonduree also borrowed money from Golam Sumdanee, who was obliged to bring an action against her to recover the amount, and obtained a decree on 17th August 1848. Under this decree 17 villages of talook Panday Gangoor in Pergunnah Kole were sold and purchased by the defendant Suhodara Bibee on the 2nd of January 1849. An attempt was subsequently made by Motee Soonduree to set aside the sale,

and she got a decree in the first Court on 29th December 1858; but this order was reversed by a decision of the late Sudder Court of the 18th of December 1861.

Under a decree for costs obtained by Bechun Lal and Brojo Lal Oopahya, certain mehals (Temar, Jelalpore, and Suhorabhoooa in Pergunnah Role, and mouzah Doomree Kalyanpore in the same Pergunnah) were sold on 7th September 1858, and purchased by the defendant Surhodara.

There were other defendants to this suit; but as they have not appealed, we think it unnecessary to encumber our judgment with a statement of their claims.

The Principal Sudder Ameen ruled that, from and after the death of Motee Soonduree, all auction sales made against her, and all private sales and leases made and granted by her, should be annulled, and that the defendants should furnish adequate security for the protection of the property in their possession within three months, or in default of so doing, the plaintiff should be put into possession of the state on his furnishing security, and from him the purchasers would receive the profits of the property they had purchased, and Motee Soonduree the profits of any property that remained in her possession, and the ticcadars should receive the profits of their ticca lease until re-payment of their debts in full: and if the debts were liquidated previous to her death, then Motee Soonduree should enjoy those profits.

From this decision, three appeals have been filed. The objections taken may be thus classed:—1*st*. Want of jurisdiction on the part of the Principal Sudder Ameen of the 24-Pergunnahs to try the case; 2*ndly*, limitation; 3*rdly*, that the plea of waste was by no means established, and therefore the order of the Principal Sudder Ameen depriving the defendants, appellants, of possession is unjust and illegal.

With regard to the plea of want of jurisdiction, we think the objection taken is untenable. Part of the property, for which the present action was brought, is situated in the 24-Pergunnahs, and the remainder or larger portion in zillah Behar. The suit was instituted in the 24-Pergunnahs; and by the permission of the Sudder Court, the Principal Sudder Ameen of that district was allowed to try the claim for the whole of the property in suit. After the case had proceeded to a certain stage, and the parties had produced their evidence, the plaintiffs withdrew their claim against the defendants residing, and in regard to the property situated, in the 24-Pergunnahs; and the Principal Sudder Ameen proceeded to dispose of the suit thus curtailed. As the Principal Sudder Ameen had once obtained the sanction of the Sudder Court to try the case, and the defendants were not taken by surprise or put to any inconvenience greater than they would have been had plaintiffs not withdrawn this part of their claim, we see nothing irregular in the proceedings of the Lower Court, and reject this objection.

The plea of limitation comes up to us in various forms.

First, it is urged that, by a late ruling of the High Court in the case of Jeonath Bhuggut and others, appellants, *versus* Roopa Koonwur, dated 8th June 1863* it was

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* The 8th June 1863.

Present:

The Hon'ble Sir Barnes Peacock, Kt., *Chief Justice*, and the Hon'ble E. P. Levinge, *Judge*.

Case No. 182 of 1861.

Regular Appeal from a decision passed by Mr. H. S. Nelson, Judge of Sarun, dated the 11th February 1861.

Jeonath Bhuggut and others (Plaintiffs), *Appellants*,

versus

Roopa Koonwur and others (Defendants), *Respondents*.

Baboo Kishen Succa Mookerjee for Appellants.

Moulvie Syed Murhumut Hossein and *Baboo Mohesh Chunder Chowdhry* for Respondents.

Judgment.—We think that the Judge was wrong in his decision in respect of the Law of Limitation, and that the case must be remanded to the Judge to try the case on the merits. The plaintiff sought to set aside certain deeds of which some were executed more than 18 years before the plaint was filed, and others were executed within 12 years before the date of the filing of the plaint. The Judge has evidently made some mistake, because he says in his judgment that all the deeds were "executed at dates more than 12 years preceding the date of the institution of this suit:" and acting upon that supposition he says "this part of the plaintiffs' claim is barred." We think that the Judge was clearly wrong as regards those deeds which were executed by Roopa Koonwur, and by those claimed under the ekrarnamah of 1840 within 12 years before the institution of the suit, and that he was right as regard those executed more than 12 years before the institution of the suit. In a suit to set aside a deed, the cause of action accrue, when the deed is executed. This suit was commenced in 1860 and was consequently governed by the old Law of Limitation. The suit, therefore, so far as it related to the deeds executed more than 12 years before the commencement of the suit was barred by the Statute of Limitations. If the plaintiffs did not know that those deeds were executed, the case might come under the latter part of Section 14 Regulation III of 1793; but it is not alleged or proved that the plaintiff first knew of the deeds within 12 years next before the commencement of this suit.

held that, even in the case of a Hindoo widow a reversioner cannot, during her life-time, sue to set aside a sale made by her if twelve years have elapsed since the date of sale, and that limitation may then be successfully pleaded against such a claim, this limitation could not, however, be pleaded against the reversioner after the widow's death when he succeeded to the property as heir, for then he would be entitled to the property in a different capacity. But during the life-time of the widow, a sale by her after the expiry of 12 years could not be questioned, though the reversioner might sue to have the sale declared void, and to prevent waste. Accepting this ruling, we shall apply it to such of the defendants whose cases fall within it. Now, the only one of the appellants protected by this rule is Suhodhara Bibee in regard to the property Talook Panday Gaugoor purchased by her in January 1849.

Secondly, it is urged that, under the provisions of Clause 3 Section 1 of Act XIV of 1859, a suit to set aside a sale in execution of a decree must be brought within one year from the date of the confirmation of such sale. This suit was instituted on 2nd December 1862, and the sales objected to were made in 1851, 1852, 1855 and 1858. Act XIV of 1859 came into operation from the 1st of January 1862, under the provisions of Section 1 of Act XI of 1861; and if effect be allowed to Section 18 of the former Act, by which a party was allowed two years' grace to bring a suit, the plaintiff would be within time.

It is contended that, in the case of Ram Lal Sircar dated 20th September 1864, it was ruled that Clause 3 Section 1 of Act XIV of 1859 did not prevent a reversioner questioning the validity of an execution-sale after the expiry of one year. In that case, however, the widow was dead, and the reversioner was seeking to enter into possession, and the question between the parties there was, whether the sale of the rights and interests of the widow conveyed anything beyond a life-interest in the property; and it was necessary to determine this point before the Law of Limitation could be applied. In the present case, however, the widow is alive, and the law would be applicable to any reversioner questioning the validity of the sale during her life-time, though it might prove no bar to his action to set it aside after her death when he had assumed a different position, being no longer a reversioner, but having the right to enter upon the possession of the property at once.

On the question of waste, we find no case made out. The waste complained of is mentioned in the latter part of the plaintiff's statement and is confined to the cutting down of trees by the ticcadars, &c. Now, no proof of this is given, and therefore, the respondent avails himself of the form of probable danger which the Lower Court has suggested to him, *viz.*, injury to the estate from withholding the Government Revenue. Now, this description of injury is nowhere pleaded, nor can the respondent shew that, since the defendants have been in possession, they have withheld the Government dues. There must be some overt acts on the part of the lessees or occupants indicative of waste or injury before a Court of Justice can deprive them of possession. Where parties have paid valuable consideration for properties in their possession, they cannot be deprived of that possession merely on the unproved fears of a reversioner that his interests may be injured. Looking at all the circumstances of this case, the Court are disposed to look upon it as a collusive suit brought by the reversioner with the consent of the widow for the purpose of getting rid of sales and leases, which during her life-time at least, must be considered good and valid; and, under this view of the case, we decree the appeals, and reverse this decision of the Lower Court in regard to the appellants and dismiss the suit against them with costs.

Continued.

Therefore we think they were barred as regards those deeds which were executed more than 12 years before the institution of the suit. In the case cited, the plaintiffs' suit was brought after the death of the widow, and he was, therefore, entitled to possession if the deed executed by the widow was not valid. That case is very different from the present, for in that case the cause of action accrued upon the death of the widow.

Then, as to the declaration of right which the plaintiff seeks to have under Section 15 Act VIII of 1859, the Judge says that the cause of action accrued at the time of Gungun Bhuggut's death.

The plaintiffs are not entitled to have a mere declaration of right that, upon the death of the widow, they will be the reversionary heirs. But their title must be enquired into in order to ascertain whether they are entitled to impeach the deeds.

The case must go back to the Judge to try the case upon the merits, as to the deeds executed within 12 years next before the commencement of the suit. The question, whether the plaintiffs are entitled to impeach the deeds is one of the questions to be decided by the Judge when the case comes before him to try the validity of the deeds. That question depends upon whether they are the reversionary heirs, and, as such, entitled to inherit the property upon the death of the widow.

The case is remanded.

The 31st March 1865.

Present:

The Hon'ble W. Morgan and Shumboonath Pundit, *Judges.*

Jurisdiction—Recovery of money taken under decree reversed on appeal.

Case No. 2922 of 1864.

Special Appeal from a decision passed by Mr. C. Hobhouse, Judge of Midnapore, dated the 5th August 1864, reversing a decision passed by the Sudder Ameen of that District, dated the 23rd February 1863.

Nursing Churn Sein and another (Plaintiffs), *Appellants,*

versus

Bidyadhuree Dossee (Defendant), *Respondent.*

Baboos Mohendro Lal Shome and *Mohesh Chunder Bose* for Appellants.

Baboos Sreenath Doss and *Hem Chunder Banerjee* for Respondent.

The recovery back of money taken in execution of a decree which is afterwards reversed on appeal, is not the subject of a new suit. The matter must be enquired into by the Court which passed the decree, as a question arising between the parties relating to the execution of such decree.

MONEY belonging to the special appellant was taken from the Collectorate in execution of a decree passed against him On appeal the suit was dismissed, and the special appellant released from the demand. The wording of the decree was confined to the reversal of the decree of the Lower Court, and the dismissal of the plaintiff's claim. As a result of this decree, all that had been done in execution of the decree thereby reversed, fell to the ground, and the now defendant was bound to restore the money received by him from the Collectorate. The present suit is brought to recover that money. It appears to us, that the terms of Section 11 of Act XXIII of 1861 distinctly show that such a matter is not to be the subject of a new suit, but must be enquired into by the Court passing the decree as a question arising between the parties relating to the execution of such decree. This also was the opinion of the Lower Appellate Court. We dismiss the appeal with costs.

The 5th April 1865.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Jurisdiction—Judgment of Appellate Court (Reasons for, required)—Absence of Judge—Action without Jurisdiction—Re-trial by first Court.

Case No. 3256 of 1864.

Special Appeal from a decision passed by Mr. A. W. Russell, Officiating Judge of Behar, dated the 12th December 1863, affirming a decision passed by the Principal Sudder Ameen of that District dated the 27th September 1860.

Lalla Bhoyro Lal and others (Defendants), *Appellants,*

versus

Lalla Mokoond Lal and others (Plaintiffs) *Respondents.*

Mr. A. A. Sevestre and *Baboo Mohendro Lal Shome* for Appellants.

Mr. C. Gregory and *Baboo Unnoda Pershad Banerjee* for Respondents.

This case was formerly remanded for the Judge to give his reasons for reversing the decision of the first Court. The Judge had left India; and his successor, without any order from the High Court, re-decided the case *de novo* on the merits, on the ground that his predecessor, being no longer in the country, could not certify his reasons. On special appeal the decision of the succeeding Judge was quashed as made without jurisdiction. The original judgment of the Lower Appellate Court having been based on documents not seen by the first Court, the case was remanded in order to be remitted to the first Court for the purpose of re-deciding the case *de novo* with reference to the new evidence adduced before the Lower Appellate Court.

IN this case, the original judgment of the Lower Appellate Court was in these terms and no more;—

"The Principal Sudder Ameen appears to "me to have rejected the bond contrary to "the weight of evidence, and to be mistaken "in stating that a deed of subsequent date "is alluded to in it, as it appears from the "lease in question that it is dated Jyte 26th "1260 F., *i. e.*, three days before the bond "which is the subject of the suit. The ap-"peal is decreed with costs."

Against this decision the defendant appealed specially, urging that the first Court had held the bond not to be a true one for various *detailed* reasons given by that Court; but that the Judge, without meeting or answering any of those reasons, had decreed

the appeal. On this special appeal, this Court was of opinion that the Judge ought to have given the grounds of his decision more fully so as to carry out the requirements of Act VIII of 1859 in this matter, and this Court required the Judge to certify his reasons.

When this order reached the Zillah Court, the Judge, in respect to whom this Court had passed the above order, *viz.*, Mr. Morris Beaufort, had left India, and his successor, Mr. A. W. Russell, without any order from this Court, re-decided the case, on the ground that, Mr. Morris Beaufort being no longer in the country, that gentleman could not certify his reasons, and that Mr. A. W. Russell could, of course, not do so. Mr. Russell having gone into the merits, decided in favor of defendant.

A special appeal was then made by plaintiff on the ground that Mr. Russell had assumed a jurisdiction to try this case when he had none either *inherent* in his Court or conferred by this Court, and that all his proceedings and the re-trial by him *de novo* were beyond jurisdiction and consequently null and void. This ground appeared to this Court a valid one, and *that* special appeal of plaintiff was decreed accordingly; but we considered that the defendant, as original special appellant, ought to be allowed time to file another special appeal against the original judgment of Mr. Beaufort, as otherwise defendant would be prejudiced by the mere accident of the absence of Mr. Morris Beaufort, and the inability of any one else to certify the reasons of his apparently illegal judgment.

Defendant has accordingly now filed a special appeal on these pleas:

I. The Judge, Mr. Beaufort, is wrong in saying that the Principal Sudder Ameen considered a deed of an *anterior* to be one of a *posterior* date, for the deed which the Principal Sudder Ameen referred to, was of *posterior* date, and was a bill of sale by Sitaram taken from the record No. 100 of 1859, whereas what the Judge looked at was a lease of 26th Jyte 1260, which the Principal Sudder Ameen had never seen, and which the Judge should not have made the basis of his decision without allowing the special appellant the benefit of the opinon of the two Courts upon it, to which the special appellant was entitled.

II. That the Judge had not mentioned the deed of sale of the 26th Poos 1263.

III. That Kalee Churn, one of the defendants, had not himself executed, and had not authorized any one to execute in his behalf the deed of 29th Jyte 1260.

We are quite unable to look at the judgment of Mr. A. W. Russell in this case, for it was entirely without jurisdiction, and, as before stated, quashed by us. Nor do we derive any assistance in this case from the judgment of Mr. Morris Beaufort, for it was almost entirely devoid of reasons; and as he is no longer in the country, the reasons cannot be supplemented by being certified by him. We are, therefore, on the one hand, left to the judgment of the Principal Sudder Ameen, and, on the other, it is admitted by both parties that the Principal Sudder Ameen had not before him at all the deed of the 26th Jyte 1260, on which the Judge relied.

It appears there was a bill of sale of 8 annas of the property from Bhoyro Lal, Mahtab Lal, Kalee Churn, and Ooma Pershad in favor of Seetaram, dated 25th Jyte 1260, filed in No. 100 of 1859. This deed of sale referred to a bond of the 29th Jyte 1260. There was also a bill of sale, assigning a lease of 26th Poos 1263. These the Principal Sudder Ameen saw, but the lease of 26th Jyte 1260 the Principal Sudder Ameen, it is admitted by both parties, did *not* see. Nor is it at all clear from the judgment of Mr. Morris Beaufort that *he* saw the assignment of the lease of 26th Poos 1263, on which the Principal Sudder Ameen relied. Indeed, there is an entire absence of specific or distinct statement of that document in Mr. Morris Beaufort's judgment. Thus we are compelled to remand the case in order that it be remitted to the Principal Sudder Ameen, who will consider the lease of 26th Jyte 1260, and thereupon re-decide the case *de novo* duly considering the pleas in this special appeal. The party cast will, of course, have a right of appeal to the Judge on such new decision by the first Court. As the case is a very old one, it should be at once taken up out of its turn and re-decided within two months from this date. An English precept returnable in that time is to go.

Costs will follow the eventual result.

Remand accordingly.

The 5th April 1865.

Present:

The Hon'ble W. Morgan and Shumboonath Pundit, *Judges.*

Hindoo Law—Succession—Daughter's son (to estate of Grandfather).

Case No. 1766 of 1860.

Special Appeal from a decision passed by Mr. A. W. Russell, Additional Judge of Dacca, dated the 9th August 1860, *reversing a decision of Mr. T. O. Pennington, Sudder Ameen of that District, datea the 26th April* 1859.

Kummul Sha Bennick (Plaintiff), *Appellant,*

versus

Ramjee Sha Bennick (Defendant), *Respondent.*

Baboos Onocool Chunder Mookerjee, Otool Chunder Mookerjee and *Prosunno Coomar Sein* for Appellant.

Baboo Nubbo Kishen Mookerjee for Respondent.

Rules of succession for the sons of a daughter to the estate of their grandfather.

We must remand this case. The Lower Appellate Court gives no reasons for overruling the order of the Court of first instance, regarding the non-application of limitation to this case. It has also failed to enquire and find distinctly, when the plaintiffs, who are the sons of the daughter of Radhakisto, were respectively born. If Radhakisto left a son, the latter would succeed to the estate of the said Radhakisto. If Radhakisto left no son but a widow, then the widow; if a widow and a daughter, then the daughter after the death of the widow; and if a son, a widow, and a daughter, then first the son, then the widow as mother to the son, will succeed. In the last case the daughter will have no right to succeed her brother. If there was no brother, the daughter alone would have a right to succeed after the death of the widow, and her sons can only claim to succeed after the death of their mother. If there was a son, then, after his death without a wife and sons, &c., his nearest heir would be his mother, if she survived him; and after *her* death, *his* sister's sons are entitled to succeed if they were born at the time of the death of the widow, though they might not have been in existence when their maternal uncle dying was succeeded by their maternal grandmother. If there was no mother to succeed to the deceased son of Radhakisto, his sister's son in *existence* when *he* died would be entitled to succeed. Whether, after the succession of a sister's son, another son born to the said sister would be entitled to succeed with the first, is a different question. In case only of the failure of a sister's son when the son of Radhakisto died after the death of his mother; or in the absence of a sister's son when Radhakisto's widow died, if she had left a son and a widow, and the latter had survived her son, the paternal relations of the son of Radhakisto are entitled to succeed, and the subsequent birth of a son to the sister in the first case *after* the death of the maternal uncle, and in the second case after the death of the mother of the son of Radhakisto, would not affect the rights of these paternal kindred. Further, if after the death of Radhakisto or of his widow, his daughter was entitled to succeed, and did not hold possession after his or her death, as the case may be, the sons of this daughter are entitled to sue for their own rights within 12 years of the death of their own mother, and to require the period of their minority to be taken into consideration according to the principles of Section 11 of Act XIV of 1859.

Without a finding concerning the facts involved in the above considerations, neither the question of limitation nor the title of the plaintiff can be properly decided. The case is accordingly remanded to the Lower Appellate Court to find the above facts, and to decide the case *de novo* with reference to the said facts.

The 6th April 1865.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Cause of action—Decree for rent.

Case No. 2541 of 1863.

Special Appeal from a decision passed by the Additional Judge of the 24-Pergunnahs, dated the 9th June 1863, *reversing a decision passed by the Principal Sudder Ameen of that District, dated the 24th December* 1862.

Nobbo Kishen Banerjee (Plaintiff), *Appellant,*

versus

Modoo Soodun Gangooly and others (Defendants), *Respondents.*

Baboo Banee Madhub Banerjee for Appellant.

Baboos Romanath Bose, Khettumath Bose and *Modhoo Soodun Shome* for Respondents.

The right to rent on its accruing due, and not the decree for it, is the cause of action.

THE pleader urges that he is not barred by limitation under Clause 4 Section 18 Regulation VIII of 1819. But that Section is repealed by Section 1 Act X of 1859, under which last law this suit was brought and tried. It is contended that the periodical renewal of the execution of the decree under Regulation VII of 1799 gives a new cause of action. We do not think the decree is the cause of action, but the right to rent on its accruing due.

There is no ground for this special appeal, and it is dismissed with costs.

The 6th April 1865.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Evidence—Survey award—Ameen's report—Reasons for rejecting oral testimony.

Case No. 2517 of 1864.

Special Appeal from a decision passed by the Principal Sudder Ameen of Sylhet, dated the 11th June 1864, reversing a decision passed by the Moonsiff of that District, dated the 6th February 1864.

Eshan Chunder Sein (Plaintiff), *Appellant,*

versus

Huree Churn Dey and others (Defendants), *Respondents.*

Baboos Onoocool Chunder Mookerjee and *Kalee Kishen Sein* for Appellant.

Baboos Tarucknath Sein and *Romanauth Bose* for Respondents.

A survey award sought to be set aside, cannot be treated as evidence.

An Ameen's report is evidence without any specific documents corroborating his finding.

Valid reasons should be given for rejecting oral testimony.

IN this case, the plaintiff sued for confirmation of possession and to reverse the proceedings of the Survey Authorities, who had demarcated the land as that of defendants.

The first Court decreed plaintiff's case.

The Lower Appellate Court reversed this decision. Its judgment is as follows:—"It "appears that no documentary evidence has "been adduced on the part of the plaintiff in "support of his claim. He has examined "five witnesses, which anybody can easily "do; although tícca or extra Ameen's "*roidad* may be said to be documentary "evidence, still it is not, under the circum-"stances, trustworthy; consequently it cannot "be deemed sufficient proof to set aside the "survey award, for the said report founded as "it is on no documentary evidence, cannot "have precedence over the survey investiga-"tion."

The Principal Sudder Ameen having on these grounds and on these only, dismissed the plaintiff's case, the plaintiff has appealed specially, urging that the Principal Sudder Ameen has erred in law in treating as evidence the survey award to set aside which this suit was brought, and that the Ameen's report was legal evidence, although there might be no specific documents corroborating the Ameen's finding on the local enquiry.

We think both these objections are valid, and that the Principal Sudder Ameen has erred in law in respect to both these matters.

We further see a deficiency of investigation by the Principal Sudder Ameen in his rejecting the oral testimony without giving the slightest valid reasons for so doing. We consider the whole decision as very careless and incorrect.

The case will be remanded to be re-tried with reference to the above remarks.

The Weekly Reporter,

APPELLATE HIGH COURT.

No. 15.] MAY, 1865. [Vol. II.

The 7th April 1865.

Present:

The Hon'ble H. V. Bayley and G. Campbell, *Judges.*

Ancient lakheraj—Resumption (by Government as agent for zemindar)—Onus probandi.

Case No. 355 of 1864.

Regular Appeal from a decision passed by Captain Morton, Deputy Commissioner of Gowalparah, dated the 21st June 1864.

Ram Lochun Sircar (Defendant), *Appellant,*

versus

Deenonath Paul (Plaintiff), *Respondent.*

Mr. C. Gregory for Appellant.

Baboos Mohinee Mohun Roy and *Dwarkanath Mitter* for Respondent.

Suit laid at rupees 18,090.

The Government, when acting as agent of a zemindar, can only sue to resume invalid lakheraj lands under 100 beegahs. The *onus* of proof of its being mal, when so claimed, is on the zemindar.

THIS suit was brought by the plaintiff as a lakherajdar for the reversal of an order of resumption passed by the Board of Revenue on the 13th of April 1860, as to 5,032 dhoors of land. On the 10th December 1863, this Court held that the facts proved shewed that the Revenue Authorities had renounced any right of Government to resume as the paramount power, and were only acting as private agents of the zemindar, and thus could do no more than the zemindar could, *viz.*, claim to resume lands *under*, but not lands *above*, 100 beegahs in extent, whereas the area in suit was admittedly more than 100 beegahs.

The case was accordingly remanded for re-trial on the remaining issues or the pleadings.

The Judge on this remand held that the sunnud was a valid one, and was one of a date before the Company's accession to the Dewanny, *viz.*, before the 12th August 1765 A. D. The Judge also held that no proof had been shewn by the zemindar, defendant, that the land, either original or excess, had been part of his mâl estate, and that consequently, in no way, had the zemindar or his agents the right to resume it; the plaintiff's claim was accordingly decreed.

Defendant, the zemindar, now appeals here and urges:—

1*st.* That the grant was for 130 beegahs, and the plaintiff held 5,000, and the excess is resumable.

2*nd.* That the burden of proof was wrongly thrown on the defendant.

These two are the substantial pleas pressed on us, though the petition has various vain repetitions of the same pleas in other words.

We are clearly of opinion that the burden of proof was rightly put on defendant. Plaintiff sued for declaration of right to certain land as rent-free. He filed a sunnud of a date before the Company's accession, which was admitted by defendant. He was found to have possession of the area 5,032 beegahs for declaration of title to which he sued, and this is not disproved. The defendant's plea is that the sunnud, though good for 310 beegahs, is good for no more, and that the rest of the land belongs to his zemindaree. It was clearly for the zemin-

dar making this last allegation to prove it. This rule of law has always been admitted, but now definitively fixed by the very recent ruling of the High Court as to the *onus* in rent-free cases, where the zemindar claims land on as his mâl. Further, it is clearly recorded by the Judge, and not disproved here, that the zemindar did not produce zemindaree accounts or other documentary evidence to shew that the excess lands were ever his mâl.

But, in addition to this, it has not been proved that the sunnud is only for 310 beegahs; but it is *indefinite* as to area in beegahs. It is clear in this case the plaintiff had possession of the 5,032 beegahs all along from the time of the sunnud. The Government, as paramount power (as before noticed), did *not, in that* capacity, authorize any resumption; and as agent of the zemindar, its officers must be restricted to the powers of the zemindar, *viz.*, those under Section 6 Regulation XIX of 1793, *i. e.*, to resume lands held rent-free on invalid titles under 100 beegahs. But here neither is the title invalid, nor is the area under 100 beegahs. So that in every view of the case, the plaintiff is entitled to the decree which has been given him by the Lower Court. We accordingly affirm that decree, and dismiss this appeal with all costs on the defendant, appellant.

The 10th April 1865.

Present :

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Ghatwallee lands (Alienation of)—Co-plaintiffs—Different causes of action.

Case No. 3212 of 1864.

Special Appeal from a decision passed by Major J. S. Davis, Judicial Commissioner of Chotâ Nagpore, dated the 9th August 1864, *reversing a decision passed by Lieutenant E. Latour, Extra Assistant Commissioner of Maunbhoom, dated the 29th April* 1863.

The Government (Plaintiff), *Appellant,*

versus

Bourie Bhoomiz, Tabeydar Ghatwal (Plaintiff), and Sreenauth Koondoo (Defendant), *Respondents.*

Baboo Kishen Kishore Ghose for Appellant.

None for Respondents.

Suit by a tabeydar ghatwal for service-lands improperly alienated to third parties by the sirdar ghatwal. The plaintiff made the Government a defendant in the suit; but the Government also applied to be made a plaintiff in the suit in order to obtain a declaration against the sirdar ghatwal's power to make a perpetual alienation of his service-land to a sub-tenant. HELD that, as the Government's cause of action was different from that of the tabeydar ghatwal, the Government could not be made a co-plaintiff in this suit.

THIS was a suit brought by the plaintiff, a tabeydar ghatwal, to recover possession of certain service land which the sirdar ghatwal, it was alleged, had improperly alienated to third parties. The defence was that the lands belonged to the tenure of the sirdar ghatwal, and not to that of the tabeydar ghatwal. The issue on this point was decided by both the Lower Courts in favor of the sirdar ghatwal, and there is no further contention on that question.

The Government was made a defendant in the suit by the plaintiff; but it appears that the Government also applied to be made a plaintiff in the suit, not because it joined with the plaintiff the tabeydar ghatwal, in alleging that the land belongs to his tenure, but to obtain a declaration as against the sirdar ghatwal that he had no authority to make a perpetual alienation to a sub-tenant of his service-lands. The Extra Assistant Commissioner of Chotâ Nagpore granted the application of the Government, and laid down an issue as between the Government and the sirdar ghatwal, and decided that such alienation was illegal. On appeal by the defendant, the Judicial Commissioner held that there were no orders on the record admitting the Government to appear as plaintiff in the case, and that the dispute between the Government and the sirdar ghatwal as to the validity of the sub-tenure granted by the ghatwal, was one which should properly form the subject of another suit.

It is, on special appeal, shown to us that the Judicial Commissioner was in error as to the order which the Extra Assistant Commissioner passed upon the application of the Government. Those orders permitted the Government to be joined with the tabeydar ghatwal as co-plaintiff. It is then urged that the case should be remanded in order that the issue as between the Government and the sirdar ghatwal should be determined by the Judicial Commissioner. But we think that the law does not authorize the Court to make the Government a co-plaintiff in this suit. Independent of the fact that the Government is already a defendant in the suit, the Government does not join in the

plaintiff's allegation that the lands belong to the plaintiff's tenure and not to that of the defendant. The Government admits the question which is at dispute between the tabeydar and sirdar ghatwals in favor of the latter, but asks for a declaration that a ghatwal cannot make a permanent alienation, or a permanent sub-tenure of his service lands. The Government's cause of action and ground of action is completely distinct from that of the plaintiff, and the two suits cannot be joined together. This is not the case of a plaintiff having two causes of action against the same defendant, but of two plaintiffs having two separate causes of action against the same defendant. The two plaintiffs cannot sue together.

The Government may, if so advised, bring a fresh suit on its cause of action, when it will be properly decided. We consider that the decision of the issue as to the validity of the sub-tenure by the Extra Assistant Commissioner was without jurisdiction, and that it is unnecessary to remand this case to the Judicial Commissioner to pass any further decision upon it in this suit.

Appeal dismissed with costs.

The 12th April 1865.

Present:

The Hon'ble E. Jackson and F. A. Glover, *Judges.*

Hindoo Law—Adoption (of paluk putro).

Case No. 3554 of 1864.

Special Appeal from a decision passed by the Principal Sudder Ameen of Mymensingh, dated the 12th December 1864, reversing a decision passed by the Sudder Ameen af that District, dated the 20th May 1863.

Kalee Chunder Choydhry (Defendant), *Appellant,*

versus

Sheeb Chunder (Plaintiff), *Respondent.*

Baboos Onoocool Chunder Mookerjee and *Sreenath Doss* for Appellant.

Baboo Unnoda Pershad Banerjee for Respondent.

The Hindoo Law does not allow of the adoption of a *paluk putro.*

THIS was a suit by the special respondent to recover possession of certain land on the ground of purchase from one Gudadhur, the alleged heir of Huree Koomar. The plaintiff's case was, that the land was sold by Gudadhur to Kedarnath on the 1st of Assar 1260 B. S., and by Kedarnath to plaintiff on the 23rd of Jyte 1269 B. S. The plaintiff added that the defendants had likewise obtained a deed of sale from Gudadhur, and, on the strength of it, kept him out of possession.

The defendants (who are special appellants before us) admitted the title of Huree Koomar, but alleged that, on his death, the property went to his widow Jugodumba, and to his adopted son Banee Chunder; that Banee Chunder was in possession of his property long after the date of Gudadhur's deed of sale to Kedarnath, which sale was, therefore, manifestly worthless; Gudadhur having at the time no rights in the property.

They add that, on Banee Chunder's death, Gudadhur succeeded as next of kin, and, after getting possession, sold the land to them under a kubalah, dated 13th Srabun 1267 B. S.

The Court of first instance found for the defendant holding the adoption of Banee Chunder to be proved, and that he was alive and in possession at the date of the plaintiff's kubalah from Gudadhur, and holding likewise, that this Gudadhur succeeded to Banee Chunder and sold the land to defendants after his accession to the property.

The Principal Sudder Ameen tried the appeal, and an original suit brought by one Bhyrubnath to prove himself nearest of kin and heir to Banee Chunder, together; and found on the entire evidence, as disclosed in both cases, that Banee Chunder's adoption was not proved, and that the plaintiff's purchase was valid.

The only points urged before us in special appeal are; (1) that the Principal Sudder Ameen acted illegally in trying the two cases together; and (2) that a *paluk putro* is a good and valid adoption amongst Sudras according to Hindoo Law.

The second objection may be disposed of at once. There is but one form of adoption recognized by Hindoo Law Books for the Bengal Provinces, and there is, *quoad* that, no distinction made between different castes. The special appellant's pleader has been unable to show any precedent supporting his view of the case, or to point out any passage in any book of Hindoo Law which allows of such an adoption.

With regard to the first point taken in special appeal we do not see in what way the

Principal Sudder Ameen acted illegally. On the pleadings in this particular case, the first issue was:—"Was Banee Chunder the adopted son of Huree Coomar or not." And this was likewise the first point to be decided in the case in which Bhyrubnath was plaintiff. So far then from the special appellant having been endamaged, or taken by surprise, he had all the benefit derivable from the evidence adduced by Bhyrubnath, who, though opposed to him ulteriorly, had an equal object with him in proving Banee Chunder's adoption. He had, in fact, the advantage not only of his own evidence, but of that of another party besides.

We see, therefore, nothing illegal in the Principal Sudder Ameen's proceedings, or any ground for allowing this special appeal.

Dismissed with costs.

The 12th April 1865.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Sub-talookdar (Power of, to stop sale under decree)—Registration.

Case No. 1877 of 1864.

Special Appeal from a decision passed by the Additional Judge of Backergunge, dated the 30th April 1864, *affirming a decision passed by the Principal Sudder Ameen of that District, dated the 13th May* 1863.

Nittyanund (Paul Plaintiff), *Appellant,*

versus

Ram Doollub Buttobyal and others (Defendants), *Respondents.*

aboo Kalee Mohun Dass for Appellant.

Baboos Romesh Chunder Mitter and *Mohinee Mohun Roy* for Respondents.

A non-registered holder of a sub-talook cannot stop a sale under a decree if the amount of decree be not paid. He may stop the sale by paying the amount of the decree, and then bring a suit against his vendors to establish his right as sub-talookdar; and, on doing so, he may require the talookdar to register his purchase, and compel him to do so, if necessary.

THIS is a complicated case; but it seems to us that the Judge has substantially found that the defendant is the superior talookdar, and has a right to the malikana claimed by him; also, that whether the plaintiff be in possession of the sub-talook or not, he is not the holder duly registered, and, therefore, cannot stop the sale under the decree, if the amount of decree be not paid. We must, therefore, and do dismiss this appeal with costs. Appellant's only course is to stop the sale by paying the amount of the decree, and he may then bring a suit against his vendors to establish his right as sub-talookdar, and may, if he really has that character, require the superior talookdar to register his purchase, and compel him to do so, if necessary.

The 13th April 1865.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Money-decree—Attachment of land.

Case No. 3249 of 1865.

Special Appeal from a decision passed by the Judge of Bhaugulpore, dated the 12th August 1864, *reversing a decision passed by the Principal Sudder Ameen of that District, dated the 26th November* 1863.

Mednee Pershad and others (Defendants), *Appellants,*

versus

Modhoo Mungle Singh (Plaintiff), *Respondent.*

Mr. C. Gregory and *Moonshee Ameer Ali* for Appellants.

Baboos Dwarkanath Mitter and *Unnoda Pershad Banerjee* for Respondent.

A plaintiff who, by his plaint seeks a money-decree, is not estopped from proceeding against land in execution of that decree.

THIS was a suit to set aside certain kubalahs to the defendant as collusive and fraudulent against the plaintiff, and to make the land which was the subject of the kubalahs, liable in execution of a money-decree obtained by plaintiff against the defendant's vendor.

It appeared that the defendant had purchased the land in question in 1852, and, in order to obtain possession, was obliged to bring a suit of ejectment. In that suit, the present plaintiffs attempted to intervene saying that the land was the subject of mortgage to them. This intervention was disregarded (as it necessarily ought to have been), and the defendants obtained a decree for possession.

In 1855, the present plaintiffs brought a suit against the defendant's vendor for re-payment of a loan to him. He answered that he was not liable for it, as the loan had been made on a mortgage of the land in question, and that this land had been conveyed by him to the present defendants. Notwithstanding this defence, the Court gave a decree in favor of the present plaintiffs; they then sought to realize their decree by attachment of the land, alleging that the present defendant's purchase of it was fraudulent and collusive against the plaintiffs; and that the land was still liable to satisfy a decree against the vendor. This attachment was set aside by a summary order, and then this regular suit was brought by the plaintiffs to establish their claim to make this land to satisfy their decree against the defendant's alleged vendor.

In the Court of first instance, the plaintiff's claim was dismissed; but, on appeal to the Lower Appellate Court, it was upheld, the Judge finding that the alleged sales to the defendants were fraudulent and void as against the plaintiffs.

The grounds taken before us in special appeal were:—*first*, that, as the plaintiff's in their suit for re-payment of the loan distinctly alleged that they only sought a money-decree, they cannot now be allowed to make the land liable.

Secondly, that as the plaintiffs had intervened in the suit brought by the present defendant against his vendor for possession, and had not then set up that the conveyances were fraudulent, they cannot do so now.

We think both these grounds untenable. The circumstances that the plaintiff unnecessarily said (what in truth his plaint must have expressed on the face of it) that he was only seeking a money-decree, could in no way estop him from realizing that money-decree in the ordinary and legitimate modes. Also the intervention of the present plaintiffs in the suit for possession was altogether uncalled for and irregular, and could, in no degree, affect the nature of the existing suit, and the effect upon the parties of any decree to be made in it; and as nothing can be an estoppel, that is not mutual, the present plaintiff's conduct at that time and omission to allege fraud, cannot be binding upon him now.

On the whole, we see no reason to interfere with the decision below on this appeal. The appeal is, therefore, dismissed with costs.

The 13th April 1865.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Alluvial Land (claimed as Re-formation)—Evidence.

Regular Appeals from decision passed by Baboo Opendro Chunder Nyarutno Roy Bahadoor, Judge of the Small Cause Court of Furreedpore, exercising the powers of a Principal Sudder Ameen in Dacca, dated the 29th April 1863.

Case No 378 of 1863.

Ramkanye Chuckerbutty and others (Plaintiffs), *Appellants,*

versus

Juggobundhoo Bose and others (Defendants), *Respondents.*

Baboos Kally Mohun Doss and *Romesh Chunder Mitter* for Appellants.

Baboos Gopeenath Mookerjee, Chunder Madhub Ghose, Dwarkanath Mitter, Bhuggobutty Churn Ghose, and *Sreenath Doss* for Respondents.

Case No. 211 of 1864.

Issur Chunder Banerjee and others (Plaintiffs), *Appellants,*

versus

Juggobundhoo Bose and others (Defendants), *Respondents.*

Baboo Prosunno Coomar Sein for Appellants.

Mr. A. F. Lingham and *Baboos Onoocool Chunder Mookerjee, Chunder Madhub Ghose,* and *Gopeenath Mookerjee* for Respondents.

Case No. 213 of 1864:

Mirza Nissar Hossein and others (Plaintiffs), *Appellants,*

Juggobundhoo Bose and others (Defendants), *Respondents.*

Baboo Debendro Narain Bose for Appellants

Mr. A. F. Lingham and *Baboos Gopeenath Mookerjee, Onoocool Chunder Mookerjee, Chunder Madhub Ghose, Sreenath Doss,* and *Ununtoram Ghose* for Respondents.

When chur land is claimed as re-formation, independent evidence is necessary of the fact of diluvi-

ation and re-formation on the original site, and of prior occupation and right.

Case No. 378 of 1863.

THIS suit with suits Nos. 211, 212, 213, 214, and 215 of 1864, although the respective plaintiffs were different, and the defendants were not throughout the same, were taken and dealt with altogether in one judgment by the Court below, because they were all instituted for the recovery of different portions of the *same continuous chur lands* under *precisely similar* circumstances.

The principal defendants, Juggobundhoo Bose and others, had respectively been maintained in possession of the disputed lands by awards under Act IV of 1840; and these suits were brought for possession by reversal of those awards.

In 378 of 1863 the plaintiffs sued to recover two distinct plots. As to a portion of these plots, they based their claim on the allegation that it had been formed by gradual accretion upon their main lands by the action of the river Arialkhan; and as to the remaining portion, they said that it had formerly been a part of their undisputed property, then had been diluviated or washed away by the above-named river, and finally about 33 or 34 years ago, had been re-formed in its original site. The defendants, besides traversing the plaintiff's title, pleaded the Statute of Limitations. The Principal Sudder Ameen held that the question of limitation was inextricably involved in the issue on the merits, as, indeed, seems to be the case, and determined both points in favor of the defendants. Against this decision the plaintiffs now appeal, and in their grounds of appeal they rely upon their title, by *re-formation* only, and abandon that by accretion.

In the argument before us the plaintiffs' vakeel rested his case on the evidence of two witnesses, Nilmoney Sircar and Dhunjoy Sircar, both dependants of the plaintiff; and on certain measurement chittas and jumma-wasil-baki papers, all of them the private papers of the plaintiff, brought from his custody. Both witnesses identified the signatures appearing on the measurement papers to be those of certain Ameens whose names they purported to be. Now, without stopping to enquire what weight, if any, ought to be attributed to papers of this kind as evidence against strangers, we observe that all these particular documents are absolutely worthless in this case, for they do not pretend to give boundaries, and they afford no means by which the land to which they refer can be locally identified. Before we can give a decision in favor of the plaintiff, we must be satisfied in the first place that, before the alleged diluviation, the land which then occupied the site of that which is the subject of this suit, belonged to the plaintiff; and on this point we have no evidence before us. Of the documents, it is only pretended that one, namely a measurement chittah of 1216 refers to a time antecedent to the diluviation; and, as we have already said the specific subject of the chittahs cannot be recognized. The two witnesses appeared to us to be extremely untrustworthy, as the material evidence of each was an exact echo of the plaint; but even apart from this, they did not furnish us with a particle of information as to the state of things previous to, or continuously connected with the alleged diluvation. We are, therefore, of opinion that the plaintiffs in No. 378 of 1863 have not made out their case.

The pleader retained by the appellants in No. 211 of 1864 said that he had no instructions and could not argue the case. Therefore, as the appellants did not appear in person, the appeal in that case is dismissed.

In No. 212 the pleader relied also solely on title by reason of *re-formation*, but he was unable to tender any evidence either of the fact of diluviation, or of the state of things anterior thereto. The appeal in 212 is, therefore, dismissed.

Ordered, that appeals Nos. 378, 211, and 213, be dismissed with costs.

The 13th April 1865.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Alluvial lands—Pleaders (Want of instructions).

Cases Nos. 213 and 214 of 1864.

Regular Appeals from a decision passed by Baboo Opendro Chunder Nyarutno Roy Bahadoor, Judge of the Small Cause Court of Furreedpore, exercising the powers of a Principal Sudder Ameen in Dacca, dated the 29th April 1863.

Nobokissen Roy and others (Plaintiffs), *Appellants,*

versus

Juggobundhoo Bose and others (Defendants), *Respondents.*

Baboos Gopeenath Mookerjee and *Grees Chunder Ghose* for Appellants.

Baboos Onoocool Chunder Mookerjee and *Chunder Madhub Ghose* for Respondents.

Mere priority of occupation of a chur by A does not warrant the presumption that the land which, before diluviation, was on the same site as the chur now is, belonged to A's ancestor.

Delay in instructions to pleaders will not justify postponement of a case.

In No. 213 of 1864, the Appellant's case before us was supported by the evidence of three witnesses; ten kubooleuts brought from the plaintiff's own custody, and a Foujdarry proceeding of the year 1233. The title set up was that of re-formation on the site of land orginally belonging to the plaintiff's ancestor.

The documentary evidence is of more than doubtful admissibility, but this point need not be considered, because that evidence contains nothing which can serve to identify the land now in dispute with land defined at any other period. The kubooleuts do not even attempt to give any thing in the shape of metes or bounds to the land to which they relate. And the witnesses do not carry the case any higher. Two of them, while they speak to the fact of the diluviation and the subsequent re-formation, do so in very general terms, and do not tell us any thing about the occupation or ownership of the diluivated land previous to the catastrophe. They say, indeed, somewhat vaguely that the plaintiffs took possession immediately on the re-formation, and retained that possession until they were outed by the defendants; but even if we could rely upon this evidence given as it is without the slightest circumstantiality of time, place, or occurrence, and in words singularly nearly coincident with those of the plaint, we think that we cannot, from mere priority of occupation of the chur, presume that the land, which before the diluviation was on the same site as the chur now is, belonged to the plaintiff's ancestor, and unless we do this, we cannot find the issue before us in favor of the plaintiffs, who, we may remark, can only recover in this suit upon the strength of their own title, and can receive no aid from the weakness of their opponents.

This case No. 213 must also be dismissed.

In No. 214, the two pleaders retained by the appellant said that they had as yet received no instructions from their client. The appellant's mooktear was at the time standing behind them, and attempted to give them some information on the spot, but we refused to allow the time of the Court and other suitors to be wasted by a proceeding of this kind, and, as the appeal was filed as far back as the 5th of September last, we declined to postpone the case: we were, therefore, obliged to dismiss it for non-appearance of the appellants, or of any one in their behalf.

Appeals Nos. 213 and 214 are accordingly dismissed with costs.

The 13th April 1865.

Present:

The Hon'ble E. Jackson and F. A. Glover, *Judges.*

Pre-emption (as to a portion of the lands to be sold).

Case No. 3592 of 1864.

Special Appeal from a decision passed by the Additional Judge of East Burdwan, dated the 22nd August 1864, *affirming a decision passed by the Moonsiff of that District, dated the* 31*st December* 1863.

Cazee Ali (Plaintiff), *Appellant,*

versus

Sheikh Musseeutoollah and others (Defendants), *Respondents.*

Baboo Nobo Kishen Mookerjee for Appellant.

Mr. A. F. Lingham for Respondents.

In the absence of sufficient ground for refusing to take the whole of the lands to be sold, the right of pre-emption cannot be asserted as to a portion only.

This was a suit for asserting a right of pre-emption as respects a portion of certain lands, the whole of which had been sold by one of the defendants to the other. The plaintiff declined to buy the remaining portion, alleging that it was endowed property and could not be sold. The Lower Appellate Court has found that there is no proof that those lands are endowed lands; that the plaintiff made no such objection as to the purchase of them when he offered to purchase the remainder; but that it was a mere excuse, because the valuation put upon the whole of the lands was more than the plaintiff desired to give.

On special appeal, plaintiff states that the right of pre-emption goes to a portion as well as to the whole of the lands to be sold, and that the right he sought to exercise did not extend to those lands.

We think that, unless the plaintiff could show sufficient ground for refusing to take the whole of the lands, his claim to purchase only a portion of them could not stand. As he could show no sufficient grounds, the Lower Court was right to dismiss his claim.

Appeal dismissed with costs.

The 13th April 1865.

Present :

The Hon'ble E. Jackson and F. A. Glover, *Judges.*

Right of Ferry—Ownership of both banks.

Case No. 3578 of 1864.

Special Appeal from a decision passed by the Principal Sudder Ameen of Sylhet, dated the 12th September 1864, *reversing a decision passed by the Moonsiff of that District, dated the 31st May* 1864.

Sofir Merdha and others (Defendants), *Appellants,*

versus

Nobo Kishore Mohunt (Plaintiff), *Respondent.*

Baboo Rajendronath Bose for Appellants.

Mr. C. Gregory and *Baboo Debendro Narain Bose* for Respondent.

The mere fact of being the owner of both banks of a river does not give the right of ferry.

THIS was a suit for the right of ferry over the river Jacmida. The defendants, who are the special appellants before us, pleaded in the *first* instance limitation, and *secondly*, that an agreement had been come to between them and the plaintiff whereby the right of ferry, was given to the former.

The Court of first instance found that, although both banks of the river belonged to the plaintiff, yet he had given up the right to the ferry by special agreement to the defendants who had been in possession thereof for more than 12 years.

The Principal Sudder Ameen reversed this order on the ground that, as the plaintiff held both banks of the river, he, therefore, of necessity had the right of ferry.

There can be no doubt that this decision was wrong in the first place, the mere fact of special respondent owing both banks would not of necessity give him the right of ferry; but setting aside this as not germane to the present case, the special appellant pleaded a specific deed of agreement under which the right of ferry was made over to them.

This was the point for decision, and the case is remanded to the Principal Sudder Ameen in order that he may decide it. Costs will follow the result.

The 13th April 1865.

Present :

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Mortgage (Prior unregistered)—Lien by way of contract and money decree.

Case No. 3087 of 1864.

Special Appeal from a decision passed by Mr. F. L. Beaufort, Judge of the 24-Pergunnahs, dated the 25th July 1864, *modifying a decision of Baboo Grish Chunder Ghose, Principal Sudder Ameen of that District, dated the 28th December* 1863.

Nobo Coomar Doss (Plaintiff), *Appellant,*

versus

Gorachand Mookerjee (Defendant), *Respondent.*

Baboo Goopeenath Mookerjee for Appellant.

Baboo Hem hunder Banerjee for Respondent.

A prior security by unregistered contract does not give a preferential title over a second mortgagee who obtained a conveyance of the land for valuable consideration and without notice, and has foreclosed the mortgage.

THE plaintiff in this suit claimed to obtain possession of 29 beegahs; his title to which had accrued on his foreclosing a mortgage of those lands obtained from the original owners in the year 1259. The defendant contested the plaintiff's title on the allegation that the lands in question had been previously mortgaged in 1257 to him as security for a loan and that, in execution of a decree obtained on that loan, it had been sold and purchased by him. The Judge found that the title of the defendants had the priority, as the mortgage under which the defendants purchased was prior in date.

In special appeal it is objected that the Judge is in error in the view he has taken of the law, as the prior mortgagee had no special lien upon the lands, but was entitled only to a money-degree, upon obtaining which he could only sell the rights and in

terests of the judgment-debtor, the mortgagor, which had already passed away under the previous foreclosure of the second mortgagee.

We think that the Judge was wrong. The liens of the two mortgagees were of a very different character; that of the first mortgagee was a *simple contract* without any conveyance of the land and without registration or notice to the public, and it is not shewn that there was any actual notice to the second mortgagee. On the other hand, the second mortgagee obtained a direct conveyance of the land, and, acting upon his mortgage-deed, he foreclosed by usual process of law; and the rights of the mortgagor in that land so conveyed then accrued to him. Had the first mortgagee registered his lien upon the land, it would have been notice of his legal claim to the public. But he gave no such notice. The equitable title remained with the owner, the party in possession, and the plaintiff was justified in dealing with him as if no lien existed on the land: and he being an innocent purchaser for valuable consideration without notice of the former contract, cannot under such circumstances be bound by it.

The Judge's decision must be reversed, and the plaintiff's suit decreed with all costs.

The 19th April 1865.

Present:

The Hon'ble G. Campbell and E. Jackson, *Judges.*

Jurisdiction (of Civil Court)-Order of Magistrate for removal of encroachment.

Case No. 3602 of 1864.

Special Appeal from a decision passed by the Principal Sudder Ameen of Hooghly, dated the 30th August 1864, *affirming a decision passed by the Moonsiff of that District, dated the 25th February* 1864.

Anund Chunder Chatterjee (Plaintiff), *Appellant,*

versus

Rokho Tarun Chatterjee (Defendant), *Respondent.*

Baboo Brojendro Coomar Seal for Appellant.

None for Respondent.

A regular suit lies to the Civil Court from the proceedings of a Magistrate ordering the removal of an encroachment not treated as a local nuisance.

We think that the Lower Appellate Court has wrongly declined jurisdiction in this case. Section 431 of the Penal Code gives the Magistrate no authority whatever to order removal of encroachments. The Magistrate could only legally proceed under Chapter XX or Chapter XXII of the Code of Criminal Procedure. Any decision under the latter Chapter is expressly subject to regular suit. The only proceedings of a Magistrate on this subject, which cannot be thus set aside, are those under Chapter XX of the Code of Criminal Procedure. If the Magistrate had desired to treat the alleged encroachment as a local nuisance, plaintiff would have been entitled to the benefit of the Procedure under that Chapter, and the order of the Criminal Courts would have been final. But no such Procedure having been followed, there is nothing whatever to bar an action to declare plaintiff's right.

The 19th April 1865.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Appellate Court—Reversal of decree of first Court against two defendants, on appeal by one.

Case No. 3281 of 1864.

Special Appeal from a decision passed by the Judge of Chittagong, dated the 22nd August 1864, *reversing a decision passed by the Sudder Ameen of that District dated the 4th August* 1863.

Abdool Ali (Plaintiff), *Appellant,*

versus

Syed Banoo and others (Defendants), *Respondents.*

Baboo Anund Gopal Paleet for Appellant.

Moulvie Syed-Murhumut Hossein for Respondents.

When a Court of first instance decrees against two defendants on a ground not common to both, the Lower Appellate Court cannot, on appeal by one of the defendants only, reverse the whole decree.

This was a suit for possession of land against two defendants, who claimed right to their respective portions of the land by a hibbanamah and kubalah respectively. The

of Court of first instance decreed in favor of the plaintiff. Against this decision, the first defendant alone appealed, and the Lower Appellate Court, believing both deeds, reversed the whole of the decree of the first Court.

On special appeal to this Court, it is objected that, as the ground upon which the Court of first instance founded its judgment was not common to both the defences before it, it was not competent to the Lower Appellate Court, on appeal by one of the defendants only, to reverse the whole decision of the Court below.

This objection must be upheld, and the decision of the Lower Appellate Courts is, therefore, declared void as regards the defendant Wehaonissa who comes in under the kubalah, and upheld as regards Rukeemonissa who claims under the hibbanahmah.

Decree accordingly with costs in favor of Wohaonissa.

The 20th April 1865.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Suit for possession—Issue—Joint Hindoo Family—Presumption.

Case No. 3285 of 1864.

Special Appeal from a decision passed by the Deputy Commissioner of Chota Nagpore, dated the 3rd September 1864, *reversing a decision passed by the Moonsiff of that District, dated the 11th June* 1864.

Moonaye Surmah (Plaintiff), *Appellant,*

versus

Lomun Surmah (Defendant), *Respondent.*

Baboo Mohinee Mohun Roy for Appellant,
None for Respondent.

When a plaintiff claims land in the possession of the defendants, and the defendants resist his claim, the single issue in the case is whether or not the plaintiff has proved his right to the land.

The presumption obtains of a continuance of the joint right to ancestral property of a member of a joint Hindoo family, unless it is shewn that he has, either by his own act or by the act of some one competent to bind him, parted with that right.

In this suit, the plaintiff, the younger of three brothers, sued his two brothers for possession of his share of the inheritance. The Court of first instance decreed in favor of the plaintiff; but on appeal to the Deputy Commissioner, this decree was reversed. In the plaint, the plaintiff based his claim on the following grounds: namely, that he was half-brother to the two defendants; that until 1268 all three had been living in commensality; that then they divided the inheritance between them; and that in 1270 the defendants dispossessed plaintiff of his share. On first hearing the case, the Deputy Commissioner made the following order:—"The record contains no evidence of the "dispossession in 1270, nor of the separation "in 1268, as alleged by the plaintiff. It "would seem, if these facts be not proved, "plaintiff's claim is barred by the Law of "Limitation, of which the Court must take "judicial notice, whether pleaded or not. "The Moonsiff will take evidence and report "within 14 days on the following points on "which issues are framed as follows:—

"1st.—Did the plaintiff separate in 1268 "from the defendants?

"2nd.—Did the defendants in Phalgoon "30th, 1270, dispossess the plaintiff?

The Moonsiff reported that the plaintiff and defendants did separate in Kartic 1268, and that in 1271 the defendants dispossessed the plaintiff.

Upon receiving this report the Deputy Commissioner gave the following judgment:—The proof of the dispossession in "1270 does not seem to me satisfactory; it "merely amounts to this, that plaintiff asked "defendants for a separate share of the land "and was refused. But nothing appears as "to what was done with the land when the "brothers seperated, whether it was divided "or what. A plaintiff must prove his case "as laid in the plaint, and certainly dispos-"session has not been proved in this case. "I decree the appeal with costs."

On special appeal to this Court, it is objected:—*First.*—that the question of dispossession, on which the Lower Appellate Court dismissed the plaintiff's claim, was not only not material to the case, but could not arise under the pleadings on the record.

Secondly.—That the real issue in the case was one of conflicting title, which ought to have been determined irrespective of the question of possession.

We think these objections are valid. The plaintiff lays claim to certain land, which is not in his own possession but in that of the defendants, and the defendants resist his claim; the single issue in the case is whether or not the plaintiff has made out his claim of right to that land. We remand the case for re-trial of this issue, with the remark that as it is admitted by both sides that the

land in question was, until 1268, enjoyed in commensality by the plaintiff and the defendants together, forming one joint Hindoo family, the presumption obtains that the plaintiff still possesses his joint right to the property unless it be shown by reasonable evidence that he has either by his own act, or by the act of some one competent to bind him, parted with that right.

The case is remanded for re-trial in accordance with the above observations.

The 20th April 1865.

Present:

The Hon'ble G. Campbell and E. Jackson, *Judges.*

Right of way (over decreed land).

Case No. 2708 of 1864.

Special Appeal from a decision passed by the Judge of Hooghly, dated the 3rd June 1864, reversing a decision passed by Moulvie Nazeerooddeen Khan, Principal Sudder Ameen of that District, dated the 28th December 1863.

Nobin Chunder Mojoomdar and others (Plaintiff's,) *Appellants,*

versus

Jutadhree Holdar (Defendant), *Respondent.*

Baboo Nobo Kishen Mookerjee for Appellants.

Baboo Rajendur Misser for Respondent.

A, claiming a right of way over land taken possession of by B in execution of a decree, cannot intervene under Section 230, Act VIII of 1859, but must bring a regular suit to establish his right.

THE plaintiff in this suit sought for a declaration of his right of way over the defendant's land. The Judge has dismissed the suit, and his decision is objected to on special appeal.

We find that the defendant in this suit had, in execution of decree, obtained possession of the land on which this right of way is claimed, and that the present plaintiff intervened in that execution case to prevent the defendant obtaining possession, and the case as between them has been tried under Section 230 Act VIII of 1859.

This is altogether irregular. The plaintiff could not intervene under that Section. The question as to his right of way is no bar to the defendant's obtaining possession of their decreed land. The plaintiff, if he desire to establish a right of way, should bring a regular suit for that purpose. All the proceedings in this case are null and void. Appellant must pay the costs.

The 20th April 1865.

Present:

The Hon'ble E. Jackson and F. A. Glover, *Judges.*

Mortgage—Interest—Mode of calculation.

Case No. 3584 of 1864.

Special Appeal from a decision passed by the Principal Sudder Ameen of Bhaugulpore, dated the 23rd September 1864, reversing a decision passed by the Moonsiff of that District, dated the 18th March 1864.

Syed Enaet Ali and others (Defendants), *Appellants,*

versus

Kuhur Roy and others (Plaintiffs), *Respondents.*

Mr. J. Baptist and *Moonshee Ameer Ali* for Appellants.

Moulvie Syed Mulhumut Hossein for Respondents.

There is no law restricting a mortgagee to the receipt, by way of interest, of the amount of principal lent. The mode of calculation to be followed in such cases is every year to add the amount of interest to the principal sum, and then deduct the value of the usufruct.

THIS was a suit to recover rupees 75-14, principal and interest of a zur-i-peshgee advance made by the plaintiff to the defendant, who is the special appellant before us, in the year 1258 B. S.

It is not contested that the special respondent advanced rupees 75 to the special appellant, on the understanding that he was to hold the land, pay its Government Revenue, and one rupee per annum as acknowledgment to the owner, until both principal and interest of the advance were liquidated. The land was so held up to the year 1271 B. S., when the special respondent was dispossessed. His plea is that there is still a balance due to him, and this he seeks to recover.

The defence was that the zur-i-peshgheedar had collected more than his dues, and had agreed to give up the land on that understanding, agreeing also to refund the sum of rupees 174-1-5, as surplus collections over and above what he was entitled to.

The Moonsiff found that there was no proof of this mutual agreement; and taking the

admission of the plaintiff that he had received rupees 154-12-6 from the land during his period of occupancy, considered that not only had he no claim on the land-owner, but that he ought to refund rupees 4-12-6, the excess of his receipts over the principal sum advanced *plus* an equal sum by way of interest.

The Principal Sudder Ameen calculated differently. He took year by year the amount of the advance, added to it interest at 12 per cent, and then deducted the value of the usufruct. On this calculation, made from the time of the advance being given, up to the date of special respondent's dispossession, he found that special appellant had still rupees 29-2-6 to receive, and for this amount he gave him a decree, reversing the judgment of the first Court.

In special appeal, it is urged:—

1*st*.—That the Principal Sudder Ameen has taken no notice of the agreement made between the parties under which special respondent offered to give up the land, and to re-pay rupees 174-1-5 surplus collections; and

2*nd*.—That the Principal Sudder Ameen's calculations are incorrect.

The *first* objection, we observe, was not taken before the Lower Appellate Court. The Moonsiff held that there was no such agreement; and the special appellant, by not mentioning his objection in appeal to the Principal Sudder Ameen, must be held to have waived it.

With regard to the *second* objection, we think that the Principal Sudder Ameen was right.

The argument derived from Regulation XV of 1793, Section 10, applies only to cases where there has been accumulated interest; and there is no law restricting a mortgagee to the receipt in way of interest of the amount of principal lent (Macpherson on mortgages, page 224, and S. D. A. Rep. 1859, page 1543); whilst the method of calculation used by the Principal Sudder Ameen is the one usually followed, and is supported by the decision of the late Sudder Court (S. D. A. Rep. 1848, page 549, and 1852, page 831).

We see, therefore, no reason to interfere with his decision, and dismiss the special appeal with costs.

The 21st April 1865.

Present:

The Hon'ble H. V. Bayley and B. Phear, *Judges.*

Ejectment (by one of several joint lessors).

Case No. 3461 of 1864.

Special Appeal from a decision passed by the Judge of Patna, dated the 31st August 1864, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 25th May 1864.

Mudun Singh and others (Plaintiffs), *Appellants,*

versus

Nurput Singh and others (Defendants), *Respondents.*

Mr. J. Baptist for Appellants.

Baboo Kishen Succa Mookerjee for Respondents.

One of several joint lessors can eject a lessee after expiry of the lease.

In this case, plaintiffs sued to recover possession of certain lands held by them under two leases; the one for payment in *kind* or "*bhaolee*," and the other for payment in *cash* or *nugdee*.

The Lower Appellate Court has upheld the nugdee lease, but rejected the bhaolee pottah, and held this to be terminable yearly.

The plaintiff appeals specially, urging that he was ejected by one of many co-sharers, and the consent of all was requisite to his ejectment. We, however, think that, the lease being a joint one, there is no doubt that any joint lessor, after expiry of the lease, can refuse the lessee to remain.

Plaintiff then pleads to us that he should have the benefit of Section 6 Act X of 1859, or rights of occupancy as in possession more than 12 years. But we are not shewn that this plea was taken below. Indeed, as to Section 6, we observe that the case was instituted before Act X of 1859 was passed, and no other previous law gives rights of occupancy by 12 years' possession.

The last plea is that the bhaolee lease is not such a yearly one that plaintiff can be ejected at the end of the year. But it is found that the lease is one terminable yearly, and it is not proved that this is not the case.

Mr. Baptist was distinctly asked if he had any authority to cite on his 2*nd* and 3*rd* pleas, and did not produce any.

On the whole, we see no reason to interfere with the decision of the Court below, and we accordingly dismiss this special appeal with costs.

There is an objection taken under Section 348, *viz.*, that special respondent was not a party to the nuldee pottah. But as while admitting that he held from Assin 1262 to 8th Kartick 1265, the special respondent did not prove that he did not receive rent, or thus specially relieve himself from being bound by the nuldee pottah, we over-rule this objection.

The 25th April 1865.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges*

Money-decree—Immoveable property.

Case No. 2710 of 1864.

Special Appeal from a decision passed by the Judge of Hooghly, dated the 3rd June 1864, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 28th December 1863.

Woomesh Chunder Paul Chowdhry, and others (Plaintiffs), *Appellants,*

versus

Ram Coomar Paul and others (Defendants), *Respondents.*

Baboos Kishen Kishore Ghose and *Greeja Sunkur Mojoomdar* for Appellants.

Mr. R. E. Twidale for Respondents.

The immoveable property of a debtor which he permits a relative to deal with as his own, and to sell to a *bonâ fide* purchaser for valuable consideration, cannot be sold in execution of a money-decree obtained after the transfer.

PLAINTIFF is the holder of a decree against one Ram Coomar Paul for money. During the pendency of the suit in which the decree for money was obtained, the plaintiff unsuccessfully demanded from the Court the attachment of the property, and the defendant purchased the property now sued for, viz., *pucca* house and garden, from the sister of the debtor. Plaintiff alleges that this was a fraudulent and collusive transfer; he therefore prays to have it set aside, and the property sold in satisfaction of his money-decree.

The defendant alleges that he purchased the property from the sister of the debtor for valuable consideration and in entire good faith.

The Lower Appellate Court finds that the property belongs to the debtor and not to his sister, and that defendant purchased in good faith and for valuable consideration, and obtained possession. We, therefore, dismissed the plaintiff's claim.

Plaintiff now appeals specially, urging that as the property was not that of the vendor, the sale by her conveyed nothing to the defendant, and the property remained the debtors and subject now to be sold in satisfaction of the plaintiff's decree.

The decree obtained by the plaintiff was a money-decree, and the plaintiff had no lien on the property sold to the defendant. The debtor stood by, and allowed his sister to deal with the property as her own, and to sell it for valuable consideration to a party acting in entire good faith. Under these circumstances, the debtor could not himself recover the property, neither can the present plaintiff who comes in as the holder of a money-decree obtained after the above transfer. Had plaintiff had any lien on the property at the time of the transfer, the matter would have borne a different aspect; as it is, we dismiss the special appeal with costs.

The 25th April 1864.

Present:

The Hon'ble W. Morgan and Shumboonath Pundit, *Judges.*

Hindow Widow—Junglebooree pottah.

Case No. 427 of 1864.

Regular Appeal from a decision passed by the Principal Sudder Ameen of the 24-Pergunnahs, dated the 17th August 1864

Ran Sagur Singh (one of the Defendants), *Appellant,*

versus

Ranee Kasheesuree (Plaintiff), *Respondent.*

Mr. R. E. Twidale for Appellant.

Babobs Dwarkanath Mitter and *Kishen Kishore Ghose* for Respondent.

A Hindoo Widow having granted a junglebooree pottah containing the ordinary provisions which had been acquiesced in and confirmed by various persons interested in disputing it,—HELD that whatever defect may have belonged to the pottah originally, it could not be cancelled at the suit of one of the persons who had recognised it.

THE pottah, which it is the object of this suit to set aside, is admittedly a *bonâ fide* pottah, granted on fair terms, and containing the most of the usual stipulations found in junglebooree pottahs. It was granted in the Bengal year 1213 (A. D. 1806), since which time a great portion, if not all, of the

lands have been clearly by the grantee. During the life-time of Ranee Shunkuree the grantor, the existence of the pottah, and the character in which the defendant held the land were, we are satisfied, well known to those interested in the estate after the death of the said Ranee.

She died in the year 1259 B. E. Since that time, the present plaintiff Kasheesuree, who is the guardian of her minor son on whose behalf she has instituted this suit, has brought suits for rent against the defendant, and has also received rent (the rent so sued for and received being at the rate payable by the pottah) without, in any way, disputing the pottah. It was not until the year 1864, that the present suit was brought to contest the right of Ranee Shunkuree to grant such a pottah, on the ground that her interest was merely the limited interest of a Hindoo widow, and that she could, therefore, grant no such pottah.

The litigation between Ranee Shunkuree and her adopted son terminated in a compromise by which certain portions of her husband's estate (including the lands contained in this pottah) were given to the widow. She took them as shebait, the lands being then devoted, or feigned to be devoted, to some religious trust. But she may properly be regarded, for the purposes of this suit, as having the ordinary Hindoo widow's estate, since it is admitted that the nature of her tenure of these lands has now (in other suits) been ascertained to be rather a beneficial private right in herself than a strict religious trust.

Under the circumstances which we have stated above, the pottah being of old date, having been, as is admitted, fairly granted with the usual conditions, and having been acquiesced in, and confirmed by, various persons interested in disputing it, we think we are not required in the persent appeal to consider the general question of a widow's power to grant such a pottah. There is sufficient to show that, at least against the person who is substantially the party now seeking to avoid it, the pottah ought not to be cancelled and set aside, which is what is sought to be done in the present suit. It does not follow from our decision that the defendant's holding is established as a tenure of which the rent is fixed in perpetuity, or that the proprietors of the estate are precluded from raising the rent of this holding.

We decree the appeal with costs.

The 27th April 1865.

Present:

The Hon'ble F. A. Glover and A. G. Macpherson, *Judges.*

Hindoo Law (Mitacshara)—Suit by son to annul alienation of ancestral property by father)—Onus probandi—Application of purchase money.

Case No. 3477 of 1864.

Special Appeal from a decision passed by the Principal Sudder Ameen of Tirhoot, dated the 27th August 1864, *reversing a decision passed by the Sudder Ameen of that District, dated the 25th January* 1864.

Jugdel Narain Suhaye (Plaintiff), *Appellant,*

versus

Lalla Ram Prokash and others (Defendants), *Respondents.*

Mr. R. T. Allan and *Baboo Romesh Chunder Mitter* for Appellant

Baboos Kishen Succa Mookerjee and *Kalee Kishen Sein* for Respondents.

In a suit by a son to annul an alienation of ancestral property by his father, the onus is not on the son to prove the absence of necessity for the sale, but on the purchaser to prove the existence of the necessity.

When the necessity is shown, it is not for the lender to see to the application of his money, nor can his title be vitiated even if the borrower wastes the loan and neglects to appropriate it to the purpose for which it was borrowed.

THIS was a suit to annul a deed of sale granted by special appellant's father to the special respondent, on the ground that, according to the Mitacshara Law, such alienation of the family property was illegal, without the special appellant's (the son's) consent.

The Principal Sudder Ameen found that there existed such a necessity for the sale as exempted it from the ordinary rule of Mitacshara Law; and that the conveyance by the father was therefore valid, the son's dissent notwithstanding.

The only question before us in special appeal is, whether there has been such a necessity shewn as would justify the father in selling, and whether the purchaser acted *bona fide* and bought the land believing and having assured himself of that necessity.

The Principal Sudder Ameen's decision is faulty in many points, notably where he lays it down that the son should have proved that there were no debts, and that the "*onus*" of proving his case lay on him, whereas it was clearly for the purchaser to show the ex-

istence of the necessity. As it happens, however, the Principal Sudder Ameen, notwithstanding his erroneous ruling on the question of *onus*, has gone into evidence, and has held on it that the sale of the land was an absolute necessity, it being carried out for the purpose of paying off an ancestral debt incurred for the due performance of marriage and funeral expenses, &c. &c.

This would be a "pressing need," and under such circumstances a sale would be justifiable.

The Principal Sudder Ameen has found, as a fact on the evidence, that this was the nature of the debt, and that being so, there is no ground for interference in special appeal.

For the rest, we observe that, following the ruling laid down in the well-known case of Hunooman Pershad Pandy (Privy Council Appeals, Volume VI, page 393,) the necessity being shown, it was not for the lender to see to the application of his money, nor could his title be vitiated even though the borrower wasted the loan and neglected to appropriate it to the purpose for which it was borrowed.

We, therefore, dismiss this special appeal with costs.

The Weekly Reporter,

APPELLATE HIGH COURT.

No. 16.] MAY, 1865. Vol. II

The 15th April 1865.

Present :

The Hon'ble W. Morgan and Shumboonath Pundit, *Judges.*

Alluvial lands.

Case No. 3414 of 1864.

Special Appeal from a decision passed by Mr. F. J. Cockburn, Additional Judge of Dacca, dated the 2nd September 1864, *reversing a decision passed by Baboo Opendur Chunder Nyarutno, Principal Sudder Ameen of that District, dated the 27th March* 1863.

Adoo Mean *alias* Gholam Ahud Chowdhry (one of the Defendants), *Appellant,*

versus

Shibo Soonduree *alias* Brohmo Moyee Debia (Plaintiff), *Respondent.*

Baboos Mohinee Mohun Roy and *Otool Chunder Mookerjee* for Appellant.

Baboos Onoocool Chunder Mookrejee and *Dwarkanath Mitter* for Respondent.

The party to whose lands new formations gradually accrete is entitled to them, though he may not have lost any lands, and though the accretion may have been caused by the washing away of the lands of another person.

THE decree given below is founded simply upon the ground that the lands decreed are formations upon the old sites of the lands of the plaintiff washed away by diluvion. By the law of this country the party to whose lands new formations gradually accrete is entitled to them, though he may not have lost any lands, and the accretion may have been caused by the washing away of the lands of another person.

If, therefore, the lands in dispute are accretions to the lands of the plaintiff, the decree obtained by him is right. If they are accretions to the lands of the defendant the plaintiff has no right to them, though they may be formations on the old sites of his lands now washed away. It is, however, to be borne in mind that, if the lands are not proved to be accretions to the lands of either party, the provisions of Clause 5 of Section 4 of Regulation XI of 1825 are to be referred to with a view to find out the party to whom the lands in dispute should be decreed.

We, therefore, remand the case to the Lower Appellate Court to re-try the case according to the directions recorded above.

The 27th April 1865.

Present :

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Resumption (of Tanks).

Case No. 3282 of 1864.

Special Appeal from a decision passed by the Principal Sudder Ameen of East Burdwan, dated the 28th June 1864, *affirming a decision passed by the Moonsiff of that District, dated the 22nd May* 1863.

Judoonath Sircar and another (Plaintiffs),

Appellants,

versus

Bonomalee Mitter and others (Defendants), *Respondents.*

Baboo Gopeenath Mookerjee for Appellants.

Baboo Banee Madhub Banerjee for Respondents.

A tank granted subsequently to 1790 is liable to resumption in the absence of proof of its having been either the condition of the grant or the intention of the grantor that the tank should be a public benefit.

Such a case does not come within the ruling of the Full Bench of the 9th of January 1865.

We have compared this case with that decided by the Full Bench of 9th January 1865, which had regard to the question of the validity of tanks granted rent-free for the benefit of the public. But, on examining the *sunnud* in the case, we do not find it to be on all fours with the *sunnud* in the case decided by the Full Bench. In that case the grant was made avowedly for the benefit of the public, owing to the scarcity of water and to prevent desertion; and the grant was upheld by the majority of the Court, because the use of water by the tenant of the zemindaree was looked on in the nature of rent reserved to the zemindar.

But, in the present case, the grant says nothing about scarcity of water, depopulation of the village, or any public benefit. No such plea appears to have been advanced by the tenant; and though the Civil Court does find that the tank is a public benefit, there does not seem to be anything to warrant a finding that such was the condition of the grant or the intention of the grantor.

The second Court has wholly missed the point at issue, and has misapprehended the case.

No doubt, when any individual has once excavated a tank, other persons and neighbours, besides the excavator, may drink of the water. But we think that we ought, in a case like this, to look at the intention of the grantor, and the general benefit to the public at large; and no such benefit appears to have been contemplated in this case.

Accepting, then, the doctrine laid down by the majority of the Court in the Full Bench decision quoted, we are unable to say that the present suit comes within that ruling, and we think it desirable that the said doctrine should not be strained, or carried too far.

In this view, holding the case not to be on all fours, and the grant to be admittedly one posterior to 1790, we see nothing to bind the Putneedar from enforcing the rights inherent in his tenure, and we reverse the decisions of both Courts, and decree this appeal with costs.

The 27th April 1865.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Priority of Attachment—Ancestral debt—Liability of heir.

Case No. 538 of 1864.

Application for review of judgment passed by Messrs. Justices Loch and Glover, on 9th June 1864, *in special appeal No.* 2859 *of* 1863.

Unnopoorna Dassea (Respondent), *Petitioner,*

versus

Gunga Narain Paul (Appellant), *Opposite party.*

Mr. R. T. Allan for Petitioner.

Baboo Prosunno Coomar Sein for Opposite party.

If two parties attach a property in execution of separate decrees, and the sale of property takes place at the instance of the decree-holder who made the second attachment, the decree-holder who made the first attachment will be first satisfied from the sale proceeds, but the sale cannot be disturbed if such decree-holder instead of taking payment of his claim out of the sale proceeds puts up the rights and interests of his debtor in the property for sale.

There is nothing in the Hindoo Law to show that the property of a deceased person is so hypothecated for his debts as to prevent his heir from disposing of it to a third party, or to allow a creditor to follow it and take it out of the hands of a third party, who has purchased in good faith and for valuable consideration. The creditor may hold the heir personally liable for the debt, but he cannot follow the property.

In conformity with the resolution of the Court, dated 3rd February 1865, this case was argued before us. Against the application for review, it was urged 1st, that as the first decree-holder had, in execution, attached the property in question in the month of Srabun 1268 before it was attached by the other decree-holder in Aghraun of the same year, the sale which took place in execution of the first decree, though subsequent in time to the sale under the second decree, must have the preference, because of the priority of the attachment; 2nd, that, under the Hindoo Law, an obligation rests on the heir to pay the debts of his ancestor, and the property cannot be considered to belong to the heirs till such debts have been paid. Consequently a creditor of the ancestor has a lien in such property, and may follow it wherever he may find it, whether in the hands of the heir or of a third party who has purchased it for valuable consideration in good faith from the heir.

On the *first* point, we think that the pleader is altogether mistaken. Priority of attachment entitles the attaching decree-holder to have his claim satisfied first, but gives him no other preference. If two parties attach a property in execution of separate decrees, and the sale of the property takes place at the instance of the decree-holder who made the second attachment, the decree of the decree-holder who made the first attachment, will be first satisfied from the sale proceeds; but the sale cannot be disturbed if such decree-holder, instead, of taking his money out of the sale proceeds, put up the rights and interests of his debtor in the property again for sale.

On the *second* ground, we think that, in our judgment of 9th June 1864, we carried the doctrine of the liability of an heir under the Hindoo Law to pay the debts of his ancestor, too far. There is, no doubt, a moral obligation to do so; but we do not find, nor can the pleader shew us from any text of Hindoo Law, that the property of a deceased person is so hypothecated for his debts, as to prevent his heir from disposing of it to a third party, or to allow a creditor to follow it and take it out of the hands of a third party who has purchased in good faith and for valuable consideration. The creditor may hold the heir personally liable for the debt, if he have alienated the property, but he cannot, we think, follow the property. Under this view of the case, we set aside our former order, and confirm the order passed by the Judge on 14th August 1863. The petitioner will obtain his costs.

The 28th April 1865.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Award of Arbitration—Enlargement of time for delivery of—Deviations from, by Court—Jurisdiction—Permission to bring fresh suit.

Regular Appeals from a decision passed by the Principal Sudder Ameen of Dacca, dated the 31st December 1863.

Case No. 40 of 1864.

Anund Mohun Paul Chowdhry (Plaintiff), *Appellant,*

versus

Ram Kishen Paul Chowdhry and others (Defendants), *Respondents.*

Mr. R. T. Allan and *Baboo Kalee Mohun Doss* for Appellant.

Baboos Unnodapershad Banerjee, Dwarkanath Mitter, Opprokash Chunder Mookerjee, and *Onoocool Chunder Mookerjee* for Respondents.

Suit laid at Rupees 77,083-9as.

Case No. 57 of 1864.

Gobind Chunder Paul Chowdhry and others (Plaintiffs), *Appellants,*

versus

Ram Kishen Paul Chowdhry and others (Defendants), *Respondents.*

Baboos Onoocool Chunder Mookerjee and *Opprokash Chunder Mookerjee* for Appellants.

Mr. R. T. Allan and *Boboos Kalee Mohun Doss Dwarkanath Mitter,* and *Unnoda Pershad Banerjee* for Respondents.

Suid laid at Rupees 84,628.

Under Section 318 Act VIII of 1859 the Court may, at its discretion, enlarge the period for the delivery of an award of arbitration without the consent of, and even if opposed by, the parties.

The time for delivery of the award was enlarged to 10th December. On that day the arbitrator gave notice to the Lower Court that the award was ready, and gave reasons for not delivering it on that day, with which reasons the Court was satisfied. HELD that the delivery of the award on the 12th, and the receipt of it by the Court on that day as an award of the 10th, were not such an irregularity as to nullify the award.

The introduction into the Judgment of provisions materially varying and affecting the rights of the parties as declared in the award, is a deviation from the award, made without jurisdiction, and vitiates the award.

The Courts have no power to reserve permission to a plaintiff to bring a fresh suit for the same matter, except under Section 97 of Act VIII of 1859; and that Section applies only to cases where a plaintiff *before final judgment* is permitted by the Court to *withdraw from his suit* with liberty to sue again.

SEVERAL suits being pending since early in the year 1861, the matters in dispute in the suits were, by the consent of all the parties referred to arbitration. An arbitrator was duly appointed, and the time within which he was to deliver his award was, by consent, enlarged to the 10th of October 1863. A further enlargement to the 10th of December was applied for by the arbitrator and the parties; but the Court considered that six weeks would be sufficient, and enlarged the time only to the 22nd of November, stating, in the order granting the enlargement, that no further time would be granted. The 22nd of November fell on a

Sunday, and the Court was, on account of certain holidays, closed during the four or five days immediately preceding. On the 23rd of November, the arbitrator presented a petition praying that the time for delivering the award might be further enlarged to the 10th of December. The application was opposed by some of the parties (including Anund Mohun Paul Chowdhry, the appellant in appeal No. 40); but the Court, nevertheless, granted the enlargement which was asked for. Anund Mohun Paul Chowdhry also sought to have it declared that the arbitration was at an end, and that he withdrew from his submission to arbitration. The Court, however, refused to declare the arbitration at an end; or to allow any of the parties to recall their submission to arbitration. On the 10th of December, the arbitrator gave notice to the Court that his decision was made. He did not actually deliver his award on that day, but "he transmitted the report and other papers successively on the 11th and 12th December." Objections having been taken to the award by the various parties, it was (under Section 323 of Act VIII of 1859) remitted to the arbitrator for re-consideration. The award was subsequently re-submitted to the Court by the arbitrator with some amendments. Further objections were taken to the amended award, which were disposed of by the Court in a judgment out of which the appeals now before us arise. Finally, the Court passed judgment according to the award, but with certain alterations.

It is against this judgment that the present appeals have been made. Into many of the points raised by the Memoranda of appeal, we decline to enter. They are points bearing on the merits of the arbitrator's decision, and on the mode in which the arbitration was conducted. As to such matters there is no appeal to this Court: for where a judgment is given according to the award of an arbitrator, such judgment is, by Section 325 of Act VIII of 1859, declared to be final. There are, however, two objections which have been taken to this judgment, on which objections we think that the appellants are entitled to be heard. It is said that the judgment is not a judgment given according to the award of an arbitrator. If it is not, and the deviation is not one which the Court is entitled under Section 322 to make, then it does not fall within the provision of Section 325, and this Court clearly has the power to set it aside, although we have not the power to enter into the merits of an award, or of a judgment passed in accordance with an award. It is contended, *first*, that no award in the legal sense of the term was ever made by the arbitrator; and *second*, that if an award ever was made, the judgment given has not been given according to it.

As regards the *first* objection, it is urged that the enlargement of the time for delivering the award from the 23rd November to the 10th December was under the circumstances illegal; that the arbitrator's appointment and powers ceased on the 22nd November, and could not be revived except by the consent of parties; and therefore that the report made by the arbitrator in December was not the award of an arbitrator at all, and the Court had no power to pass judgment upon it as such. We are of opinion that the time for delivering the award was legally enlarged by the Court to the 10th of December. We do think that references to arbitration in case like the present are not to be dealt with in all respects with the same strictness which would be applied to them by the law of England. And we consider that the enlargement of time made by the Court on the 23rd of November, being a Monday, and being the first day on which the Court was open after some four or five holidays, was a sufficient enlargement of the time which had expired on the previous Sunday, the 22nd of November. We also consider that, under Section 318, the Court may, in its discretion, enlarge the period for the delivery of the award without the consent of the parties, and even if they oppose the enlargement. Section 318 does not provide that enlargements shall be granted only on consent; and it appears to us that, although no doubt the reference to arbitration must, in the first instance, be by consent, it would be very undesirable to give the parties power to withdraw from an arbitration to which they had once consented, so long as there was no reason to suppose that the arbitrator was performing his duty improperly, and so long as the Court thought it most conducive to the ends of justice that the reference to arbitration should be carried out. The appellants did not, in argument, object to the validity of the award on the ground that, whereas the last enlargment, was to the 10th of December, the award was not actually delivered till the 12th of that month. There was here no doubt an irregularity. But the arbitrator on the 10th gave notice to the Court that the award was ready, and

gave reasons for not delivering it on that day, with which reasons the Lower Court was satisfied: and as the award was, in fact, delivered on the 12th, and received by the Court as of the 10th, we do not consider that the irregularity was such as vitiates the proceedings and renders the award a nullity. On the whole, therefore, the first objection taken by the appellants fails.

The *second* objection is that judgment has not been given according to the award such as it is; and this objection, we find, is well founded. Three distinct deviations from the award (none of them being modifications, corrections, or amendments which the Court had power under Section 322 to make) have been brought to our notice. The arbitrator has found that a certain sum is due from the appellant Anund Mohun, to Gobind Chunder and Mohesh Chunder Paul Chowdhry (the appellants in appeal No. 57); but the award contains no direction that the sum so found to be due shall be paid. Gobind Chunder and Mohesh Chunder in their suit (No. 38) made no claim against Anund Mohun; and the Lower Court did not pass judgment that the sum in question should be paid. The Court, however, went out of its way to add to its judgment a permission to Gobind Chunder and Mohesh Chunder to bring a fresh suit against Anund Mohun, to recover what the arbitrator found to be due from him, declaring that the award and the proceedings in the suits in which it was made should be no bar to such fresh suit. This was an addition to the award which the Court had clearly no power to make, and in making it the Court was acting without jurisdiction. We have to observe further that the Court apparently misconceived wholly the law as to reserving permission to a plaintiff to bring a fresh suit. The Court says that the permission in the present instance was given under Section 97 of Act VIII. But Section 97 has no possible application. That Section applies only to the case of a plaintiff who, *at any time before final judgment*, satisfies the Court that there are sufficient grounds for permitting him *to withdraw from the suit* with liberty to bring a fresh suit for the same matter. To say nothing of the fact that it was in the Court's final judgment that the permission to sue again was given, the plaintiffs here never wished to withdraw and never did withdraw from their suit. So that the permission to sue again, which was introduced into the judgment of the Lower Court, was not only introduced without jurisdiction and contrary to the express provisions of Sections 322 and 325, but was based on an entire misconception of the circumstances under which the law empowers the Courts to permit a plaintiff to bring a second suit for the same matter.

The next deviation which has been relied on is that the Court has introduced into its judgment provisions as to the mode in which certain balances called respectively, 'recoverable' and 'irrecoverable' are to be recovered and dealt with, which provisions vary and materially affect the rights of the parties as they are declared in the award. There is no doubt that here also the judgment of the Court has been passed, not in accordance with the award, and consequently without jurisdiction. If the award, as it stood, was ineffectual and inconvenient, it probably might have been set right either under Section 322 or under Section 323. But the Court had no power whatever to take upon itself to set it right in passing judgment on the award under Section 325.

The last deviation is as to costs. The award is silent as to the costs of the suits: the judgment provides that they shall be paid in a certain manner. This also is wrong and beyond the power of the Court. Under Section 322 the Court might have made an order as to the costs *of the arbitration*, on the application of either party. It does not appear that any application was ever made even as to the costs of the arbitration. But if it had been, power to deal with the costs *of the arbitration* does not include power to deal with the costs *of the suit*. The costs of the suit in many cases may be, and in the present case must be, very heavy as compared with the costs of the arbitration only.

We set aside the judgment of the Lower Court as made whithout jurisdiction: and we direct that the Court do proceed to deal with the award strictly in the manner provided by Act VIII of 1859, and to pass judgment *according to the award*. Under the circumstances, the parties will respectively bear their own costs of these appeals.

In conclusion, we desire to impress upon the Lower Court the necessity of the most careful attention, and the strictest adherence to the provisions of the Code of Civil Procedure at all times. Had those provisions been kept in view, much that is unsatisfactory in these suits and in the procedure which has been followed in them, would have been avoided.

The 28th April 1865.

Present:

The Hon'ble F. A. Glover and A. G. Macpherson, *Judges.*

Suit for possession—Reversal of award (under Act IV of 1840)—Limitation—Date of cause of action.

Case No. 3583 of 1864.

Special Appeal from a decision passed by the Judge of Mymensingh, dated the 13th September 1864, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 11th June 1861.

Hurish Chunder Chowdhry (Plaintiff), *Appellant,*

versus

Huro Soodaree Debia and others (Defendants), *Respondents.*

Baboo Lulleet Chunder Sein for Appellant.

Baboo Kalee Kishen Sein for Respondents.

A party seeking to disturb an award passed under Act IV of 1840 must date his action, not from the Magistrate's decision confirming a previous possession, but from the actual date of dispossession.

THIS was a suit to recover possession of land by reversal of an award under Act IV of 1840.

Both Lower Courts held that the plaintiff (special appellant before us) was barred by limitation, he not having been in possession within 12 years of the date of suit.

It is urged in special appeal that the Judge was wrong in calculating the time as he did, and that the cause of action could not be carried further back than the date of the Act IV award: that is, beyond April 1852.

We see no reason to interfere. A party seeking to disturb an award passed under Act IV of 1840, must date his action not from the Magistrate's decision which merely confirms a previous possession, but from the actual date of dispossession. In this case, the Judge was found, as a fact, that the special appellant has never been in possession of the disputed lands at any time within twelve years from the date of his suit. The cause of his action was his dispossession by the other side; but he failed both before the Magistrate and in the Civil Court to prove either that he had been dispossessed at the time stated, or that he had ever had possession at all.

We, therefore, dismiss this special appeal with costs.

The 29th April 1865.

Present:

The Hon'ble W. Morgan and Shumboonath Pundit, *Judges.*

Suit for recovery of lands passed in execution of decree for possession after foreclosure.

Case No. 15 of 1865.

Regular Appeal from a decision passed by the Principal Sudder Ameen of the 24-Pergunnahs, dated the 28th September 1864.

Chunder Coomar Roy (Plaintiff), *Appellant,*

versus

Prannath Roy Chowdhry (Defendant), *Respondent.*

Baboos Kishen Kishore Ghose, Sreenath Doss, and *Kalee Mohun Doss* for Appellant.

Baboos Unnoda Pershad Banerjee, Thakoor Doss Mookerjee, and *Kedarnath Mojoomdar* for Respondent.

No suit lies for the recovery of possession of lands which have passed in execution of a decree for possession after foreclosure of mortgage.

WE are quite satisfied that the lands in dispute were included within the boundaries of the lands claimed by Baboo Prannath Chowdhry as given in the plaint held by him for possession after foreclosure of two mortgages by certain Mahomedans, all whose lands are claimed by the plaintiff as purchased subsequent to the said mortgages by the plaintiff's ancestor, Baboo Ram Ruttun Roy. The claim of the Chowdhry was decreed without any objection on the ground of the boundaries exceeding the lands mortgaged or encroaching upon the lands of the plaintiff's ancestor.

It appears, however, that, with the alleged consent of the Chowdhry, long before the institution of the suit by him, the plaintiff's ancestor had, with reference to disputes already pending, caused the property in dispute to be settled with him separately from the lands which the plaintiff admits were the lands claimed by and decreed to the said Chowdhry. In execution of the decree, the decree-holder asked for possession of lands in such terms as would without any specification necessarily include the lands in dispute. The ancestor of the plaintiff protested against this prayer, and informed the Court that, within the boundaries, a part (*viz.*, the lands now in dispute) was admittedly undisputed; that it did not belong to the estate of the Mahomedans from whom both parties had derived their title, but had been pur-

chased by the objector from another Hindoo proprietor; and that another parcel to the north was the lakheraj of the mortgagors, but which had not passed by the mortgages. He prayed that the delivery of possession should be confined to the *mál* portion mortgaged, and should not extend to the lakheraj which should remain in his possession as before. In this prayer, no distinct allusion was made to the exclusion of the lands now in dispute, perhaps because they were treated as undisputed. The allusion, however, to these lands in dispute shews that the plaintiff's ancestor clearly understood that they fell within the boundaries of the lands which he asked to be delivered in execution. This petition of objection was over-ruled in a general manner in December 1859 by the Judge executing the decree. The plaintiff admits that the lakheraj was given in execution, and that he cannot sue to recover them. If the case of the defendant stopped here, there might have been some ground for doubts regarding the legal propriety of allowing the defendant in this case to hold the lands in dispute. It appears that, on the petition of objections being filed by the ancestor of the plaintiff, Pran Nath met it by a counter-petition, claiming the lands in dispute as included within his decree, and denying that any settlement of it had ever been separately made in the Collectorate with his consent and knowledge. The Judge executing the decree, when he rejected the application of Ram Ruttun Roy, must be considered to have tried and decided all the issues raised before him regarding the execution matter; and even if he decided any thing improperly, his decision cannot be corrected by a separate suit. Further, the plaintiff's ancestor in that case failed to produce the original deed of sale under which he said he had acquired the property in dispute, and, notwithstanding the issue raised by the Chowdhry's counter-petition, failed to offer any evidence to shew that the allotment was made with the said Chowdhry's consent. Subsequently possession was given of the lands decreed and (as a part of them) of the lands in dispute. The evidence in the case has satisfied us of that matter, and the reference made by the plaintiff to the evidence of several witnesses examined before the Collector during the mutation of name of the said Chowdhry on his applying for it after obtaining possession in execution, does not prove, as alleged, that the witnesses examined before the Collector, or the facts then disclosed, shew that bamboos were planted on the terminating boundaries of the lands decreed, and that the lands in dispute were excluded from the lands of which possession was given in execution. The utmost that can be inferred from these proceedings is that, notwithstanding the formal delivery of possession, some rents for some time were perhaps collected by the ancestor of the plaintiff, a fact which, if true, would not alter the legal position of the parties before us. It is proved that, in the course of this enquiry for mutation which was ultimately granted, reference was made to the Court which had executed the decree, and a reply received that the Court intended to give, and had given, possession of the the lands in dispute to the decree-holder in execution of the decree. These facts place it beyond all doubt that, in the execution case of Pran Nath, the lands in dispute were respectively claimed, and denied to be included in this decree, and were, after the passing of Act VIII of 1859, made over to the decree-holder as part of the decree. We must accordingly hold that, whatever be the merits of the claim of the plaintiff, we are debarred from trying this case for recovery of possession of the lands in dispute, because we are not satisfied that, in execution, besides the lands which the plaintiff allows were the decreed lands, his ancestor, as he alleges, lost only the lakheraj portion, and that the lands in dispute were not formally made over in execution, but were taken possession of by the defendant after the order for mutation of the Chowdhry's name was passed. We hold that the lands passed in execution; and, if so, plaintiff admits he has no cause of action.

We reject the appeal with costs.

The 1st May 1865.

Present:

The Hon'ble Sir Barnes Peacock, Kt., *Chief Justice*, and Shumboonath Pundit, *Judge*.

Bills of Exchange—Pleas by Drawer (Agency; Discharge of acceptor by holder; Want of notice of dishonor).

Case No. 262 of 1864.

Regular Appeal from a decision passed by Mr. W. Ainslie, Judge of Patna, dated the 13th April 1864.

Mr. T. M. Pigou (Defendant), *Appellant*,

versus

Ram Kishen and others (Plaintiffs), *Respondents*.

Mr. C. Gregory and *Baboo Dwarkanath Mitter* for Appellant.

Messrs. R. T. Allan and *A. F. Lingham* for Respondents.

If the drawer of a Bill does not, on the face of the Bill of Exchange, show that he drew it as agent, he cannot set up as a defence that he drew the Bill as an agent. Nor can he plead that the holder discharged the acceptor, and that no notice of dishonor was given to him, when the goods, on the faith of which the Bill was accepted, were attached and sold with the drawer's consent in payment of his debt to a third party.

THIS is a very clear case. The action is brought against Pigou as the drawer of some Bills of Exchange which he had drawn on Palmer & Co. One defence was that Pigou was merely Palmer and Co.'s agent in drawing the Bills, and, therefore, was not liable. But the Court determined on the last occasion that, when a man draws a Bill, and it does not appear on the face of it that he drew it as agent, he cannot set up as a defence that he drew the Bill as an agent. Further, we do not think that, in point of fact, he has made out that he was merely an agent.

The next question is whether Pigou is discharged from the liability to pay the Bills, the plaintiff having given notice for them. The two grounds of defence set up are: 1*st* that the plaintiff discharged Palmer & Co., the acceptors; 2*ndly*, that no notice of dishonor was given to Pigou. The determination of these two questions depends upon whether Pigou could have sued Palmer and Co. on the Bills, if the plaintiffs had not discharged them and had given due notice of dishonor to Pigou. If Pigou could have sued Palmer and Co., either for the goods or upon the Bills, then Pigou might have been injured by reason of the notice of dishonor not having been given to him; and by reason of the plaintiff having discharged Palmer and Co. But if Pigou could not sue Palmer and Co., then he is not injured either by the discharge of Palmer and Co., or the want of notice of dishonor. Now, could Pigou have sued Palmer and Co. for those goods? It is said that the goods shipped were vested in Palmer and Co. by Pigou's having insured them in Palmer and Co.'s name. It is not necessary for us to enquire whether the goods were vested in Palmer and Co. or not. It appears that Messrs. Gregory and Co. attached the goods as the goods of Pigou for a debt due from Pigou to them, and that, proceedings having been instituted, Pigou consented to a reference, under which it was determined that the goods (whether Pigou's or Palmer and Co.'s) were to be sold for the payment of 4,000 rupees due from Pigou to Gregory and Co. unless Pigou should pay Gregory and Co. within 15 days. Pigou did not pay, and the goods were sold and *pro tanto* Gregory and Co.'s debt was discharged to the extent of the value of these goods.

Then, could Pigou, having had the benefit of those goods, have sued Palmer and Co. for them? How could he sue Palmer and Co. when the proceeds of the goods were applied in discharge of his debt to Gregory and Co.? If he could sue Palmer and Co. he would get the value of the goods twice over. If he could not have sued for the goods, he could not have sued on the Bill which was accepted on the faith of the consignment.

Then it is said that Pigou ought to have been allowed to sue Palmer and Co. leaving Palmer and Co. to recover by a cross-action against him for the value of the goods. But would not it have been a round-about way of proceeding to allow Pigou to sue Palmer and Co. on the Bill, and to allow Palmer and Co. to sue Pigou for not sending the goods.

We think it clear that Pigou could not have sued Palmer and Co. on the Bill after the goods were sold in payment of his debt to Gregory and Co. Pigou was not damaged by not having had notice of dishonor, or by the arrangement which Palmer and Co. were discharged.

We, therefore, think that the learned Judge came to a correct conclusion in decreeing the plaintiff's case and ordering Pigou to pay all costs. His decree is, therefore, affirmed, and the appeal dismissed with costs.

The 2nd May 1865.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges*.

Section 30 Regulation II of 1819—Assessment of lakheraj—Onus probandi.

Case No. 3 of 1865.

Regular Appeal from a decision passed by the Judge of Hooghly, dated the 28th September 1864.

Soukhoda Debia (Plaintiff), *Appellant,*

versus

Sheikh Azeenooddeen and others (Defendants), *Respondents.*

Baboo Banee Madhub Banerjee for Appellant.

None for Respondents.

In a suit to assess more than 100 beegahs of land, though stated to be under Section 30 Regulation II of 18 9, but on the allegation that they are the plaintiff's mâl lands, the plantiff is bound to prove that the lands were his mâl lands on or before 1st December 1790, before the other party can be called upon to prove his title.

THIS case was remanded on 26th January 1863, with a view to have it proved whether summons was duly served on defendants or not. It has now been found that it was so served. No further objections have been made on this.

The Judge has held on the merits that as the plaintiff seeks to assess *more than* 100 beegahs, and mentions in his plaint that he seeks to do so under Section 30 Regulation II of 1819, which Section gives zemindars powers to assess lands *under* 100 *beegahs*, plaintiff is out of Court This decision was of the 28th September 1864. Since then the Full Bench judgment of the 22nd February 1864 (page 206, Weekly Reporter, Volume II, April 1865, No. 11,) has been recorded, which rules that the limitation prescribed by Section 28 Act X of 1859 and Act XIV of 1859 only applies to cases instituted after the 1st of January 1862, and that no limitation applies to suits brought under Section 28 Act X of 1859, but that in such latter case the *onus* is on the plaintiff to show that the case is one falling under Section 10 Regulation XIX of 1793, or, in other words, that the grant was subsequent to 1st December 1790.

In applying this ruling to the cases depending on it, the mere use of the words "Section 30 Regulation II of 1819" in the plaint has been held not absolutely to restrict the suit to claims for land held rent-free before 1st December 1790; but the plaintiff may amend his plaint if really he shall have sued for mâl land improperly held exempt from payment of rent.

Now, this plaint, we see, was filed on 31st December 1861, so that the limitation of Act XIV of 1859 would not apply to it under Section 28 Act X of 1859, if the suit be for *mâl* land, or, in other words, for lands held rent-free after 1st December 1790. Now, the plaint runs—"Defendants "held 216-5-13 of land without payment of "rent, and having been called upon to make "a settlement for them as such mâl lands, "have not done so on the plea of their be- "ing lakheraj. The plaintiff, therefore, sues "for a declaration of right to assess the "lands."

Under these circumstances we remand the case to the Zillah Judge to call upon the plaintiff to prove that the lands were his mâl lands on or before 1st December 1790, and if plaintiff fails to prove this, the suit must be dismissed.

Remand accordingly.

The 2nd May 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Ejectment of lakherajdar under Section 10 Regulation XIX of 1793—Onus probandi.

Case No. 3526 of 1864.

Special Appeal from a decision, passed by the Judge of Patna, dated the 19th August 1864, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 9th June 1862.

Mohunt Prem Shewuk Doss (Plaintiff), *Appellant,*

versus

Issuree Pershad and others (Defendants), *Respondents.*

Baboo Kishen Succa Mookerjee for Appellant.

Baboo Onoocool Chunder Mookerjee for Respondents.

A zemindar who, under the provisions of Section 10 Regulation XIX of 1793, ousts a party who held long possession as lakherajdar, is bound to prove his right to exercise that power before the lakherajdar is called upon to prove his title to hold the land as a valid rent-free grant.

IN this case, the plaintiff seeks to recover possession, on the allegation that he has been ousted from his lakheraj tenure by the zemindar under Section 10 Regulation XIX of 1793. As the plaintiff did not bring the action to recover within six months from the date of dispossession, the Lower Appellate

Court required him to prove his title, and, on his failing to do so, dismissed his suit.

In special appeal it is urged that the Lower Appellate Court has thrown an unnecessary burden upon the plaintiff; that under the ruling of a majority of this Court in the case of Munmohinee Dossee *vs.* Joykishen Mookerjee, dated the 12th April 1864, it was held that it lay with the defendant to prove that the lakheraj was created subsequent to December 1790, and not for plaintiff who was in possession of the land as lakheraj until ousted by the defendant to prove that the lakheraj was created prior to that date. In reply in this case, it is stated that the defendant is the representative of an auction-purchaser; that he never ejected the plaintiff. He took possession of what his vendor sold him and of which his vendor, as auction-purchaser, had entered into possession without opposition, and enjoyed it as part of his mâlgoozaree lands. As against him, therefore, the plaintiff had no action for dispossession, and, in seeking to recover possession, must prove his title. Had defendant exercised the powers given to the zemindars under Section 10 Regulation XIX of 1793, there might have been good grounds for asking him to prove that he had a right to exercise that power as against plaintiff in possession; but as defendant is not the dispossessing party, plaintiff must prove his title to the lands as any ordinary plaintiff before he can recover possession.

We agree in the ruling laid down in the decision quoted by the special appellant's pleader, that when the defendant has, under the provisions of Section 10 Regulation XIX of 1793, ousted a party who has held long possession as lakherajdar, he should be required to prove that he has a right to exercise that power before the plaintiff be called upon to prove his title to hold the land as a valid rent-free grant. In the present case, however, the defendant denies having exercised that power, and the first issue to be determined between the parties is whether the defendant did or did not oust the plaintiff. If it be proved that he did, he will have to give some proof that the lands in question formed at one time part of his permanently settled estate, and then the plaintiff will have to prove his title. If the ejectment be not proved against the defendant, the Court should then go into the question of the plaintiff's title, and pass orders accordingly. We remand the case to be disposed of with reference to the above remarks.

The 3rd May 1865.

Present:

The Hon'ble C B. Trevor and G. Campbell, *Judges.*

Suit for possession (in reversal of an Act IV award).

Case No. 3136 of 1864.

Special Appeal from a decision passed by the Additional Judge of Bhaugulpore, dated the 9th July 1864, *affirming a decision passed by the Principal Sudder Ameen of that District, dated the 26th August* 1862.

Ranee Radha Chowdhrain (Defendants), *Appellant,*

versus

Kishen Soonduree Dossia and others (Plaintiffs), *Respondents.*

Mr. Marinden and *Baboo Juggadanund Mookerjee* for Appellant.

Baboos Romesh Chunder Mitter and *Banee Madhab Banerjee* for Respondents.

To entitle a plaintiff to a decree for possession of a julkur as part of a julkur estate settled with him, but of which the defendant has obtained possession under an Act IV award, the plaintiff must show not only the original boundaries of his estate, but also modern possession.

THIS is a claim to a certain julkur as part of a julkur estate settled with plaintiff, but of which defendant has obtained possession under an Act IV award. Both the Courts below have proceeded only on the old letter of 1799 stating (in a somewhat *ex-parte* way) the old boundaries of the julkur mehal. The settlement under which the mehal is now held was subsequent to that letter; but we find in the proceedings of the Lower Court neither any reference to the settlement proceedings, nor one word regarding the subsequent possession for the long period down to 1859. We think that the judgments proceed on an entirely insufficient basis; that to entitle plaintiff to a decree, he must show not only the original boundaries of his estate, but also modern possession. We remand the case to the first Court for re-trial on this basis. The Judge of that Court will call on the parties to produce evidence both as to the boundaries laid down at the time of settlement, and as to subsequent and recent possession; and in case plaintiff proves that he held possession under a good title, and was, as he alleges, dispossessed by defendants, then and then only he will have a decree.

The 4th May 1865.

Present:

The Hon'ble C. B. Trevor, and G. Campbell, *Judges.*

Sale of immoveable property in execution of decree—Deed of gift set aside as not bona fide on suit of third party.

Case No. 3162 of 1864.

Special Appeal from a decision passed by the Judge of Backergunge, dated the 12th August 1864, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 19th February 1864.

Saraye Akun and others (Plaintiffs), *Appellants,*

versus

Champa Bibee and others (Defendants), *Respondents.*

Baboo Roopnath Banerjee for Appellants.

Baboo Romesh Chunder Mitter for Respondents.

A decree-holder failed on summary application in execution to have a deed of gift in respect of the lands in dispute set aside. In a subsequent suit a third party succeeded in setting aside the deed as not *bonâ fide.*—HELD, that the decree in favor of the third party having removed the obstruction to the decree-holder's right to bring the property to sale, and the deed of gift having been declared to be not *bonâ fide*, no second suit to determine the nature of that deed was necessary, but that the decree-holder may at once sell the property for the debts due to him.

IT appears that one Jusun Lal executed a deed of a gift in favour of one Oojal Monee on the 22nd Magh 1255, and that the plaintiff obtained the same property by deed of gift from the original donee Oojal Monee in 1265. A party, the defendant in the present suit, who had obtained a decree against Jusun Lal, made a summary application in execution to have the original gift set aside, but failed. Subsequently, a third party sued to have it set aside, and succeeded on the ground that it it was not *bonâ fide*, and that Jusun Lal had remained in possession of the property till his death. The obstruction being removed, the decree-holder, who had in the first instance ineffectually applied to have the deed of gift set aside, petition to have the property sold in execution, and succeeded.

The plaintiff now in possession sues to stay the order for sale, on the ground that without a separate suit by the decree-holder reversing the order passed on the summary application to which he was a party opposing the first hebanamah, the property cannot be sold.

The Judge dismissed plaintiff's suit, and plaintiff now appeals specially, but we think without reason. The decree in favor of the third party had removed the obstruction to the the decree-holder's right to bring the property to sale; and the plaintiff's alleged deed of title having been declared not to be a *bonâ fide* one, no second suit to determine the nature of that deed is necessary; but defendant may at once sell the property for the debt due to him. Under this view, the appeal is dismissed with costs.

The 4th May 1865.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Limitation.

Case No. 3165 of 1864.

Special Appeal from a decision passed by Mr. A. Pigou Judge, of Hooghly, dated the 13th July 1864, affirming a decision passed by the Sudder Ameen of that District, dated the 30th April 1864.

Kalee Doss Chatterjee (Plaintiff), *Appellant,*

versus

Beharee Lall Mookerjee and others (Defendants), *Respondents.*

Baboo Umbika Churn Banerjee for Appellant.

Baboo Juggadanund Mookerjee for Respondents.

Object of Section 11 Act XIV of 1859, (computation of period of limitation in cases of legal disability).

WE think that the Judge has wrongly constructed the Law of Limitation, Act XIV of 1859. Section 11 was never intended to place minors under special disability as compared to majors, but to make a special concession in their favor. A man who comes into Court after attaining his majority, if he is within the ordinary term of limitation provided by Section 1, is not bound to invoke Section 11. Section 1 is complete in itself, and applies to all suits. Section 11 is an additional or supplementary provision, giving minors liberty to take a fresh start for computation from the time of attaining majority;

provided that the privilege so accorded is limited to three years. If the plaintiff's time computing from the original cause of action (accruing in his minority) had expired during the minority, or had less than three years to run, he would have had full three years; but that not being so, he has the ordinary twelve years from the original cause of action. The decision of the Judge is reversed, and the case remanded for re-trial.

The Weekly Reporter,

APPELLATE HIGH COURT.

No. 17.] MAY, 1865. Vol. II.

The 29th April 1865.

Present:

The Hon'ble G. Loch and J. P. Norman, *Judges.*

Master and servant—Dismissal (Remedy for wrongful)—Vakeels (acting under engagement)—Remuneration of— Attorney and Client (Bonds between)— Estoppel—Onus probandi.

Cases Nos. 420 and 421 of 1863.

Regular Appeals from a decision passed by the Judge of Behar, dated the 3rd August 1863.

No. 420.

Ranee Usmut Koowar (Defendant), *Appellant,*

versus

Mr. W. Tayler (Plaintiff), *Respondent.*

Messrs. R. V. Doyne, R. E. Twidale and *C. Gregory*, and *Baboo Dwarkanath Mitter* for Appellant.

Messrs. W. M. Bourke, J. Arratoon, R. T. Allan, and *J. Baptist*, and *Moonshee Ameer Ally* for Respondent.

Every master and employer has an undoubted right to dismiss his servant or agent at any time. After the dismissal, whether wrongful or not, the servant cannot claim wages. The remedy for wrongful dismissal is by action for the damages sustained by the servant in consequence of the breach of the master's contract to employ him.

Though a vakeel is entitled to whatever charge his client agrees to, yet if a vakeel acts under an engagement constituting him the client's mooktear and legal adviser, he is bound by the same rules as an Attorney, and is, therefore, entitled only to such reasonable remuneration as the law allows.

Where a bond is given by a client to an Attorney not only is the client not estopped from disputing the consideration alleged in it, but the *onus probandi* of the fairness of the transaction lies on the Attorney.

No. 420 of 1863 is a suit by Mr. William Tayler, to recover rupees 29,773, annas 8, with interest, *viz.*, rupees 17,000 principal, and 3,910 interest, on a bond, dated the 13th of March 1861, being the amount claimed by the plaintiff as his fee for the suits referred to in the bond, *viz.*, for the suit of Ranee Sonnet Koowar *vs.* Sheikh Hoormut Ally Dewan, for procuring strict injunction empowering the aforesaid Dewan to collect rent of the whole 16 annas of the estate, and preventing Sonnet Koowar or her servants from making separate collections; and rupees 8,000, the balance of rupees 12,000, principal of the plaintiff's salary, and rupees 863-8 interest thereon, under a hookoomnamah or order, dated the 15th Cheyt 1267.

The defendant, Ranee Usmut Koowar, as to the claim for salary, answered—

First.—That, except as to the wages for the months of Falgoon and Cheyt 1269, the suit was barred by limitation.

Secondly.—That the plaintiff performed his duty under the hookoomnamah for ten months only; and that after that period, on the 15th Magh 1268 Fuslee, he was dismissed; that since that date he performed no duty as a mooktear.

Thirdly.—That the hookoomnamah dated the 29th of Assin 1268 Fuslee, was granted on several conditions—*first*, the dismissal of a suit under Act X of 1859 of Ranee Sonnet Koowar *vs.* Sheikh Hoormut Ally; *secondly*, to have recognized, as legal, a suit of Sheikh Hoormut Ally against defaulting mâlgoozars for the whole 16 annas' col-

lection, and to have the receipts of the said Ranee rejected; *thirdly*, to secure strict injunction permitting the second defendant to collect all 16 annas of rent; that out of the three conditions only one was fulfilled, *i. e.*, the suit of Ranee Sonnet Koowar was dismissed; that the other two suits failed of success; that without the fulfilment of the conditions set forth in the rokah, the basis of the bond, the plaintiff is not entitled to the amount claimed therein.

Fourthly.—That after the decease of Hoormut Ally, his son-in-law, Mirza Dost Mahomed, succeeded him as Dewan in the service of the defendant; that in a case relating to the poisoning of Hoormut Ally, the plaintiff was appointed mooktear on the part of Sheikh Aolad Ally, brother of the late Sheikh Hoormut Ally; that about that time the said Mirza Dost Mahomed and Aolad Ally, with each other's consent, represented to the defendant that the sum of rupees 17,000, fee and reward, was due by her to the plaintiff, and presented a stamped paper of bond for her signature, and accordingly, without making any enquiry as to the particulars of the transactions, or any investigation as to what amount was already paid, and what balance still remained unpaid, the defendant affixed her seal to the said stamped paper solely in reliance on the statement of the said Mirza; that subsequently, on the detection of various acts of infidelity and embezzlement of the said Mirza, the defendant discharged him from the office of Dewan; and that as the said bond was executed through the said Mirza's fraud without the fulfilment of the condition, the defendant cannot be held liable for the amount.

Fifthly.—The sum of rupees 6,000 as a reward for the aforesaid successful suit, and the wages of 10 months, total rupees 11,000, being due to the plaintiff, on reference to the serishta, the defendant found that the plaintiff, by fraud and deception, had carried away from her treasury rupees 33,650; that, after giving credit for the amount payable to the plaintiff, a surplus of rupees 22,650 is due to the defendant from the plaintiff.

The plaintiff, on the 13th of April, filed a written statement in reply, alleging—

First.— That the suit was within time.

Secondly.—That it is stated in the hookoomnamah that the reward is to be given separately in each case according to its importance, and, therefore, that the stipulation was not conditional; that the object of the defendant in appointing the plaintiff was no other than to prevent him from accepting a vakalutnamah from the opposite party; that in the sunnud of appointment mention is made that the salary was fixed for two years for the purpose of looking after the defendant's suits already instituted, and not at all such suits as might thereafter come on. Notwithstanding this, whenever any suits were brought, and the defendant found it necessary to call on the plaintiff for pleading her cause, he never refused to undertake the management of the same.

Thirdly.—That the defendant executed the bond, the foundation of the claim, after the adjustment of the accounts of fees referred to in her letter bearing her seal, dated the 29th of the 1st Assin, and delivered the same to the plaintiff after it was duly sealed, witnessed, and registered. It is explicitly set forth therein that the 17,000 rupees, the balance of fees referred to in the letter of the 29th Assin, is "due to you for the success which attends the issue of my suits." That the plea now urged as to the account adjusted prior to the bond is absurd, &c.

Fourthly.—That the plaintiff had nothing to do with the collection of any estates belonging to the defendant, nor did ever, as alleged by the defendant, realize rupees 33,650.

On the 14th of April, the Principal Sudder Ameen laid down the issues correctly, if not very clearly or concisely.

They were in substance:—

First.—Whether the suit as to the wages except for the months of Phalgoon and Cheyt 1269, was barred by limitation.

Secondly.—Whether the defendant was dismissed from his post, and ceased to perform the duties of an agent from the 13th Maugh 1268 Fuslee.

Thirdly.—Whether, according to the defendant's allegation, only one promise mentioned in the hookoomnamah of the 26th Assin 1264 Fuslee, was fulfilled; and the other two promises, *viz.*, one with reference to the validity of the suit of Sheikh Hoormut Ally Dewan against the defaulting mâlgoozars, and the other relating to the issue of imperative orders for confirmation of the authority of Sheikh Hoormut Ally were not fulfilled. And whether the seal of the defendant was affixed to the bond through fraud of Mirza Dost Mahomed.

Fourthly.—Whether the rupees 11,000, as alleged by the defendant only, were due, and whether the plaintiff actually realized the sum of rupees 33,650, as alleged.

Fifthly.—As the bond was sealed without objection by the defendant, and rupees 17,000 therein stated to be due to plaintiff,

whether the above exception taken to the bond, and the allegation as to previous payments, is admissible. The 9th of May was fixed by the Principal Sudder Ameen for the production of witnesses.

The circumstances under which this suit was called up before the Judge, and tried by him, made it incumbent upon us to try the case without any regard to the findings of the Court below, as if it had been an original suit before us.

It was shewn before us that disputes having arisen between the now defendant, the elder Ranee of the Ticcaree, and Sonnet Koowar, the younger Ranee, each desired to secure Mr. Tayler's services; that, on the 15th Cheyt 1267 F., corresponding to the 22nd of March 1860, Mr. Tayler was engaged by the defendant by hookomnamah which was in substance as follows: "To the Hon'ble Gentleman, &c. For the purpose of looking after all my cases in the Civil, Criminal, and Revenue Courts from the Zillah to the Sudder, I appoint you mooktear on my behalf. Through kindness so attend to the cases that they may come to a successful issue, and the sum of Co.'s Rs. 500 I fix as your monthly salary *(mushahara)* from this date to the end of two years. It shall be sent to you every month. Besides this, whatever case is *won by your endeavours*, in that case a reward *(khushmedee)* will be given according to the importance of the case."

The execution of this instrument is not denied by the Ranee, she admits that a sum of rupees 5,000 for ten months' salary was due to Mr. Tayler under it. But she alleged, in her answer, that Mr. Tayler was dismissed by a hookoomnamah on the 15th of Magh 1268 (10th Eebruary 1861), and since that date performed no duty as a mooktear in looking after her cases.

The first issue then is, was Mr. Tayler dismissed as alleged by the Ranee?

The *onus* of proof is on the defendant Her witnesses distinctly state that a hookoomnamah for that purpose was written on the 15th of Magh. Though their evidence goes to prove the contents of a written document, and would, therefore, have been inadmissible, if objected to, without proof of notice to Mr. Tayler to produce the original, in point of fact no objection was taken, on Mr. Tayler's part, that notice to produce the original had not been given to him. The witnesses were not cross-examined on the point. No documentary proof of the dismissal was given, nor was it shewn that any intimation of it was given by or on behalf of the Ranee to any Court. Mr. Tayler, however, *did not deny the allegation by his writen statement*, which he was allowed to put in by way of answer to the Ranee's statement, or by any direct evidence on the orginal hearing. But in the evidence given by him in support of his charge against Khoorsed Ally, he referred to it as a false statement recorded by Khoor shed Ally on behalf of the Ranee—"that on the 15th of Magh 1268, corresponding with the 10th of Feburary 1861, the elder Ranee had removed me from her attorneyship by a written order, and that after that date I did not work for her at all."

He says—"The utter falseness of this is shown, first, by the fact that a few days after that the Ranee herself presented a petition to the Magistrate of Gya, stating that I was her legal adviser and manager of the legal affairs with other complimentary things, and begging that a case of hers might be postponed to the 10th of March; and also the fact, as shown in the record, that on the 14th of March I actually pleaded for the Ranee at the Magistrate's office; and further by the entire circumstances, specially one, *viz.*, that about two or three months before the expiration of the second year, I had applications from parties at Patna to take up cases, against the elder Ranee, and I wrote to her in consequence, telling her of the fact, and that I had declined because the term of my retainer had not expired, and asking whether she wished on the expiry to renew. Copy of that letter is in my Office Letter Book, and so is her answer in which she does not decide the matter because the term was not expired, and asks who are these parties."

This argumentative answer referring to documents and acts done about which there is no dispute, is very far from being a distinct and categorical denial that any such hookoomnamah, as alleged, was written on the 15th of Magh. When a question was put to a witness called by the plaintiff, Mirza Dost Mahomed, he does not answer directly. The witness was asked—"On the 15th Magh was a hookoomnamah for Mr. Tayler's dismissal issued or not? You were Dewan." He answerd—"The servants of the Ranee were of two classes, those connected with the Office of the Dewan (their dismissal rests with the Dewan), and personal servants. Mr. Tayler was in the service of the Ranee up to the time of the execution of the bond."

Though we think that the Ranee has failed to prove the dismissal was final, so as to terminate her liability to pay Mr. Tayler

his salary, there is no such direct contradiction of the defendant's witnesses as could warrant their committal for perjury in stating that a hookoomnamah had been issued for Mr. Tayler's dismissal. The Judge seems to think that the Ranee could not dismiss Mr. Tayler except for an adequate cause. But that is an entire mistake. Every master and employer has undoubted right to dismiss his servants or agents at any time. There is no law which compels a master to retain in his service a person who has ceased to possess his confidence, or whose services he no longer requires. After the dismissal, whether wrongful or not, the servant cannot claim wages, which become due only for service actually rendered. His remedy for a wrongful dismissal is by action for the damages he may have sustained in consequence of the breach of the master's contract to employ him.

We now come to the claim of rupees 17,000 under the instrument which is called a bond.

It is as follows:—

"I, Ranee Usmut Koowar, widow and heiress, and holding possession of the estate of Rajah Modenarain Singh, deceased, zemindar of Pergunnah Summothee and others in zillah Behar, and inhabitant of Kismut Ticcaree in Pergunnah Summothee in zillah Behar.

"Whereas, I, the declarant of this by a hookoomnamah, dated the 29th Assin 1268 Fuslee, fixed rupees 22,000 as the remuneration of you, Mr. William Tayler, my mooktear, with a view to the success of the case under Section 24 of Act X of 1859, instituted by Ranee Sonnet Koowar against Sheikh Hoormut Ally Dewan, defendant, and the legality of the suit (*jowaz nalish*, the power of suing) of Sheikh Hoormut Ally against defaulting rent-payers.

"And the issue of an imperative injunction maintaining the collection of Hoormut Ally in respect of the entire 16 annas.

"And the prohibition of Ranee Sonnet and her servants from making separate collections.

"Whereas the above-said suits have been successful, and whereas, of the amount fixed for your said fees, the sum of rupees 17,000 remains balance justly due to you from me, therefore, I, the declarant, do hereby agree to pay the aforesaid sum of rupees 17,000, with the interest at the rate of 1 per cent per mensem within the space of one year, that is in the full moon of the month of Falgoon 1269 Fuslee, in one lump.

"Wherefore these few words are written in the form of the bond, that they may come of use in the time of need. Finis. Dated the 13th March 1861 A. D."

The execution of this instrument is not denied by the defendant. The issues with respect to it are:—

First.—Whether the suits mentioned therein were conducted to a successful termination or not.

Secondly.—Whether this instrument was obtained by fraud or without the fulfilment of the conditions.

Thirdly.—Whether the defendant, having signed the bond, is, as alleged by Mr. Tayler, bound by the recital contained therein that the work was done.

The history of this instrument is as follows. By the hookoomnamah of the 15th Cheyt 1267, Mr. Tayler having, as he states himself in his deposition to the Judge, received previously a complimentary present of rupees 5,000, was engaged by the Ranee as her mooktear to attend to her cases in Court from the Zillah to the Sudder, at a salary of rupees 500 a month, with a stipulation that whatever case was won by his *exertion*, he should receive a gratification or reward according to its importance.

Mr. Tayler's Counsel contended before us that the sum of rupees 500 per month was a mere retainer, and that he had a right to claim payment for all business done. But that is wholly at variance with the plain meaning of the hookoomnamah, by which the sum of rupees 500 per month is fixed as "*mushahara*," salary or wages.

On the 29th Assin 1268 Fuslee, corresponding with the 29th September 1860, a second hookoomnamah was executed by the Ranee.

Seal not legible.

"Hookoomnamah to Mr. Tayler: Whereas your respectable self is the mooktear and master of the Courts, and I consider you, in every way, to be the mooktear and master of legal affairs in Courts; and whereas at present *a false and unfounded complaint* has been preferred in a summary form before the Collector by Ranee Sonnet Koowar against the esteemed Sheikh Hoormut Ally, the Dewan of long standing, and certain rent-payers at the instigation of Ranee Sonnet Koowar have fallen into heavy arrears, and do not pay rent for the 16 annas to Sheikh Hoormut Ally Dewan, notwith-

standing the orders of the constituted authorities, and for that reason Sheikh Hoormut Ally *shall bring suits* in summary form before the Collector for the balance of rents on account of the 16 annas *against the ticcadars*. Moreover, Ranee Sonnet Koowar, notwithstanding final orders from the constituted authorities, *has not ceased from making separate collections* on the allegation of her own share, therefore I beg to write to your respected self that, in the event of the false complaint of Ranee Sonnet Koonwar against Sheikh Hoormut Ally Dewan, which is pending before the Collector, being dismissed or struck off; and of the *suits for rents* by Hoormut Ally against defaulters for the entire 16 annas being held valid, and of the issue of imperative orders by the Magistrate prohibiting Ranee Soonnet Koowar from making separate collections, so that in future Ranee Sonnet Koowar or her servants may not make any collections from the landed estate left by the deceased Rajah Modenarain Singh, or interfere with it: and that the collection of the entire 16 annas from the rent-payers be made by Sheikh Hoormut Ally in the event of the accomplishment of the work afore alluded to, I fix the sum of Co.'s rupees 22,000 as remuneration for your respected self. Out of this sum I shall immediately pay the sum of rupees 5,000. Out of the balance the sum of rupees 9,000 shall be paid on the 15th day of the full moon of the month of Poos, and the sum of rupees 7,000 on the 15th day of the full moon in the month of Cheyt of the current year. After the performance of the acts afore alluded to, the collection of the 16 annas by Sheikh Hoormut Ally, the amount shall be sent to you, and to this I will have no objection.

"The remuneration promised to your respected self shall be paid in this manner—the sum of rupees 6,000, on the account of the dismissal or striking of the complaint preferred by Sonnet Koowar against Sheikh Hoormut Ally; rupees 6,000 on being considered valid, the suits of Sheikh Hoormut Ally against the defaulting rent-payers on the 16 annas, and on the receipts of Ranee Sonnet Koowar not being accepted; and the sum of rupees 5,000 on the issue of peremptory orders for the collection by myself of the 16 annas, and for restraining Ranee Sonnet Koowar and her servants from making separate collection."

Seal.

It will be observed that the arrangement is upon the footing of the existing hookoomnamah or contract under which Mr. Tayler was acting, and (except as to the rupees 5,000 paid down) seems to do no more than fix the amount of gratification he is to receive for certain proceedings if conducted to a successful termination.

At the date of this instrument one suit was pending by Ranee Sonnet Koowar against Sheikh Hoormut Ally for the purpose of revoking his appointment as Dewan for her 8 annas share, and putting in Bundeh Ally as Dewan under Section 25 of Act X of 1859; and on the day previous to its execution, apparently in pursuance of an arrangement referred to in letter written by Hoormut Ally to Mr. Tayler on the 2nd of September 1860 hereinafter set out, a suit was instituted by Sheikh Hoormut Ally Dewan of 16 annas of the zemindary against Horko Singh mâlgoozardar for the recovery of the entire 16 annas of his rent, and for the express purpose of contesting the validity of a receipt given to him by the younger Ranee for her 8 annas share of the rent. On the 13th of December 1860, Mr. Tayler succeeded in getting the suit of Ranee Sonnet Koowar against Hoormut Ally dismissed, apparently on the ground that the charges of improper conduct against Sheikh Hoormut Ally made by Ranee Sonnet Koowar had not been proved.

On the 14th December, the suit against Horko Singh, which appears to have been instituted to test the validity of payments made to the younger Ranee, was dismissed, the Court recognizing the validity of the payment of an 8 annas share of the rents already made to the younger Ranee. Mr. Tayler admitted that he could not win, and was paid rupees 2,000 for procuring a saving clause to be inserted to the effect that the decision was without prejudice to that of the previous day. We think it clear that this suit was instituted for the express purpose of trying the second question referred to in the hookoomnamah, as to the effect of the receipt which had been given by the younger Ranee for her share of the rent, as an answer *pro tanto* to a suit by Hoormut Ally for the entire 16 annas of the rent, and that Mr. Tayler's title to the second sum depended on his winning such a suit for Hoormut Ally. Shortly after the decision of these suits in January or February 1864, Hoormut Ally was poisoned. In the proceedings relating to the poisoning, Mr. Tayler acted as mooktear for Aolad Ally the brother,

and Dost Mahomed the son-in-law of Hoormut Ally: the latter was then the Dewan of the Ranee. In the early part of March, proceedings were pending for the attachment of the zemindary.

The following account of the manner in which the bond was obtained is given by the defendant's witness Hurdeo Lall, a servant employed in the Office of the Ranee in keeping her accounts. In the case of the poisoning of Hoormut Ally. Mr. Tayler was Dost Mahomed's mooktear; therefore Dost Mahomed, stating that rupees 17,000 was due had the bond prepared. When the fact was known, Dost Mahomed was deprived of his office of Dewan. The Sircar had to obtain sums due from Mr. Tayler. Than Dost Mahomed was removed from his office.

He further says that Mr. Tayler was to look after the suits already mentioned, but that only the case under Section 25 was won. Chooramun Lall, a servant in defendant's employ, states that the suits referred to in the bond are those mentioned in the hookoomnamah of the 29th Assin, and that no suit was won except that under Section 25 of Act X. The plaintiff's witness, Mirza Dost Mahomed, states that he witnessed the acknowledgment of the Ranee who affixed her seal in the bond; that in 1268 Fuslee the case of Ranee Usmut Koowar was pending in the Criminal Court; that she sent for Mr. Tayler from Patna to Sahibgunge; that he refused to argue the case until the balance of his fees in the former case on the hookoomnamah was paid; that excuses were made as to payment in cash; that Mr. Tayler agreed to take the bond; it was written in the presence of all the Office, Khoorshed Ally, Gungah Persaud, Bhikunlall, &c.

To the question asked on cross-examination, what suits mentioned in the condition were gained? He replied Mr. Tayler had dues before my employment, and the cases with respect to which allusion is made were before my employment. I can recollect the case under Section 25 of Act X, the issue of an order for the collection of 6 annas, and for them the fees were mentioned in the hookoomnamah. It was for these cases, and these only are mentioned in the bond. He says that the proof of the fulfilment of the condition is binding on both parties. *Question.*—All that time was Mr. Tayler, your and Sheikh Aolad's mooktear? *Answer.*—In the case of poisoning, Mr. Tayler was mooktear for Aolad Ali, but in that case the fee was separately paid to Mr. Tayler by Sheikh Aolad. Mr. Tayler himself, in his deposition in the case against Khoorshed Ali, referring to the hookoomnamah of the 29th Assin, says that it was "a letter under the Ranee's own seal, specifying the number of cases.*** *All the cases were won*, and it was admitted that the money was fairly due to me." He adds that, when begged by Khoorshed Ally to plead against the attachment, he refused till payment was made; that a good deal of conversation ensued in which Khoorshed Ally took the prominent part in endeavouring to pursuade him to be satisfied with promises: that he refused because he deemed their *conduct dishonest.* He says—"It was then proposed (I cannot positively say by whom; Khoorshed Ally was there, and Dost Mahomed the son-in-law of Hoormut Ally, and their Dewan and mohurir and other people) that a formal bond should be executed by the Ranee, distinctly admitting that the money, rupees 17,000, the balance remaining, distributed through *several cases*, was due to me, and should be paid within a specific time with interest at 12 per cent. The rough draft of the bond was written in my presence under the direction of Koorshed Ally by a mohurir, was approved by me, was taken to the Ranee who was then at Gya for her seal to be fixed, attested by several witnesses, and registered." As to the time and manner in which the Ranee's signature was obtained, Mr. Tayler's statement agrees with that of the Ranee. She says, in her answer—"After the decease of Hoormut Ally, his son-in-law Mirza Dost Mahomed succeded to him as a Dewan in my service, and in the poison case the plaintiff was appointed mooktear on the part of the late Hoormut Ally, and on the part of the plaintiff Sheikh Aolad Ally brother of the late Sheik Hoormut Ally, was engaged in the capacity of a mooktear, and about that time the said Mirza Dost Mahomed and Aolad Ali, with each other's consent, represented to me that the sum of rupees 17,000, fee and reward, were due by me to Mr Tayler, and represented a stamped paper of bond for my signature, and accordingly without making any enquiry into the particulars of the transaction or any investigation as to what amount was already paid and what balance still remained unpaid, I affixed my seal to the said stamp, solely in reliance on the statement of the aforesaid Mirza, whom I subsequently discharged." The foundation of the bond is the hookoomnamah of 29th Assin 1268 F. S., by which the Ranee agreed to pay rupees 17,000, for certain acts to be successfully performed by

Tayler. These acts were estimated each at a specific sum, and the whole of the money promised was to be paid on two fixed dates, *viz.*, the full moon of Poos 1268, rupees 9,000; and the full moon of Cheyt 1268, rupees 7,000. The full moon of Poos corresponds to the 26th January 1861, and that of Cheyt to the 24th April 1861. Admitting, therefore, that Tayler had been successful in all three suits, he had no grounds for charging the Ranee or her people with dishonest conduct; for under the arrangements entered into with him by the above hookoomnamah, a large part of the sum promised to him was not due till the 24th April 1861, whereas he, in violation of his duty as mooktear, refused to act for his client, until by such refusal he had compelled her to give him the bond, dated 1st March 1861, admitting that the work had been done and that the money was due to him. The recital in the bond says, "the suits have been successful;" and Mr. Tayler's deposition in the case of Khoorshed Ali, "all the *cases were won.*"

Mr. Tayler wholly failed to show before us that he had won any case except the first case of Ranee Sonnet Koowar *vs.* Sheikh Hoormut Ali. The defendant's witnesses most distinctly say that this was the only case which was gained. The vakeels for Mr. Taylor attempted to argue before us that his success in the first suit was so complete, that the results which were to have been gained by these suits were obtained by that. We desire to observe that, if this was the case, it was Mr. Tayler's plain and obvious duty (a duty not simply morally binding upon him, but one which the Court would enforce on him as an Officer of the Court, particularly considering that his client was a lady living in strict seclusion) to have told her that, as further litigation would be unnecessary, she would not have to pay him the further sums of rupees 6,000, and rupees 5,000, as originally contemplated. There is not in the evidence of Mr. Tayler or elsewhere a trace of any discussion between the parties at the time when the bond was executed, as to whether the successful result of the *one* suit had been so complete as to entitle Mr. Tayler to the payments which, according to the original stipulation, were to be for success on three distinct matters. It is difficult to suppose that such payment would be willingly made under the circumstances. Indeed, we have proof to the contrary, for it was not until after Mr. Tayler had refused to plead as mooktear that the Ranee was induced to put her signature to the bond.

On the other hand, there is the distinct and uncompromising assertion on the face of the bond that both suits had been successful. *This was Mr. Tayler's assertion*, because, as he himself says, the draft was written in his presence by the mohurrir and approved by him. Mr. Tayler, the mooktear who himself conducted the litigation of the Ranee in all Courts, well knew whether the statement was true or not, "that the suits had been successful."

But had the results contemplated in the original hookoomnamah been obtained directly or indirectly, it is clear that the suit of Sonnet Koowar was dismissed. Therefore, the sum of rupees 6,000 stipulated for that was earned.

The second stipulation was "rupees 6,000 as being considered valid the suits of Sheikh Hoormut Ally against the defaulting rent-payers for the 16 annas, and on the receipt of Ranee Sonnet Koowar not being accepted."

The *third* is "the sum of rupees 5,000 on the issue of imperative orders for the collection by myself of the entire 16 annas, and Ranee Sonnet Koowar and her servants being restrained from making separate collection."

As regards the *second* condition, it is clear that the suit against Horko Singh was dismissed, and the receipts of the younger Ranee in that suit were held valid. We shall by-and-bye see that Mr. Tayler advised the parties that there was no hope of succeeding in this suit, and actually took a separate and distinct fee of rupees 2,000 before he would go into Court. That sum was paid to them in order to procure the insertion of a provision to prevent the defeat from prejudicing the title of Hoormut Ally to collect. In fact, in order to comply with the *second* condition, Mr. Tayler must have obtained a decision that a payment of rent made by a tenant to a part-owner of an estate should not be pleadable as a valid payment to the extent of such part-owner's share, and that in a suit which must necessarily have been brought in the name of such part-owner as co-plaintiff. It is enough to say that no such order or decision was ever passed.

As to the *third* condition, Mr. Tayler never obtained any imperative order from the Magistrate or any other judicial authority for the collection of the entire 16 annas by the elder Ranee, and restraining Ranee Sonnet Koowar from making separate collection. So far from having obtained such

imperative orders at the time he obtained the bond from her, the estate was on the point of being placed under attachment. Mr. Tayler, well knew that, by the death of Hoormut Ally, the agreement, that he should have the collection of the entire 16 annas, was at an end; and moreover, that unless he succeeded in getting the estate released, which, in fact, he failed to do, not only had the performance of the last condition become hopeless, but the whole object of the litigation in which he had been employed would be utterly and entirely defeated. It was with this knowledge, refusing, in *violation of his engagement as mooktear*, which, however, he did not throw up, to go before the Magistrate and argue a case in which all those objects were at stake, which the Ranee had particularly in view in engaging his services as mooktear, that Mr. Tayler obtained the document now sued on from his client. • • •

Mr. Tayler, however, raises the issue that his client is estopped by the admission in the bond. There cannot be a greater mistake. Mr. Tayler stood towards the Ranee in a fiduciary position as her confidential legal adviser. The law which governs the contracts of persons standing in such a relation is well stated in Story's Equity Jurisprudence, Vol. 1, Sections 310, 311, 312, and 313. "The situation of an attorney or solicitor puts it in his power to avail himself not only of the necessities of his client, but of his good nature, liberality, and credulity, to obtain undue advantages, bargains, and gratuities. Hence the law, with a wise providence, not only watches over all the transactions of parties in this predicament; but it often interposes to declare transactions void, which, as between other persons, would be held unobjectionable." "If an attorney, retaining his connection, contracts with his client, he is subject to the *onus* of proving that no advantage was taken of the situation of the latter." Again—"If a bond is obtained by an attorney from his client who is poor and distressed, and it does not appear to be for a full and fair consideration, it will be set aside as obtained by undue influence from his station. Upon a like ground, a bond taken by an attorney from his client for a specific sum, will not be allowed to stand as a security, except for the amount of fees and charges due to the attorney; for it is the general policy of Courts of Justice, in cases between attorney and client, to protect the suitors, and not to suffer any advantage to be taken of them by securities of this sort. And for the same reason, a judgment, obtained by a solicitor as security for costs, will be over-hauled even after a considerable lapse of time. So, a gift made to an attorney *pendente lite* (for it would be otherwise if the relation had completely ceased) will be set aside as obtained by improper influence; for it has been said with great force that there would be no bounds to the crushing influence of an attorney who has the affairs of a man in his hand, if it were not so." Again—"Lord Eldon, on one occasion, said, "it is almost impossible, in the course of the connection of guardian and ward, attorney and client, trustee and *cestuique trust*, that a transaction shall stand, purporting to be bounty for the execution of an antecedent duty." In Shamshoonessa Begum *vs.* Carapiet, 1 Boulnois, 328, Sir C. Jackson says—"An attorney stands in a confidential relation to his client, and is bound to protect him; and if he takes upon himself to purchase from, or otherwise deal with his client, whose interests he is bound to protect, the *onus* is thrown on the attorney to show that the client was duly cautioned, &c." A gift from a client to his attorney, while that relation subsists between them, is absolutely void. O'Brien *vs.* Lewis, Jurist 1863, page 528, is to the same effect. Mathews *vs.* Wallwyn, 4 Vesey 118-125, and Sir Watkin Lewis *vs.* Morgan, 5 Price 42, were cited to show that, as between attorney and client, the client is not concluded by the settlement of an account as a stranger would be. The notes to Fox *vs.* Mackreth, 1 White and Tudor 134, and Gresley *vs.* Mouseley 28 L. J. Chancery p. 620, were cited to show that the *onus* of proof of the fairness of the transaction lies on the attorney; and that, in such cases, the mere production of bonds, signed by the clients, is not sufficient without evidence as to the consideration for them. Applying these doctrines to the case before us, it appears that not only does the bond not estop the Ranee from disputing the consideration alleged in it; but it lies upon Mr. Tayler to establish its perfect fairness to show that the work alleged to have been done, and for which it was given, was really done by him.

We think Mr. Tayler is not entitled to recover on the bond, and it must be set aside as improperly obtained from his client.

Under the hookoomnamah of the 29th Assn, he is entitled to the sum of rupees 6,000, for the dismissal of the suit of Ranee Sonnet Koowar *vs.* Sheikh Hoormut Ally.

We have only now to consider the last issue, *viz.*, whether, assuming rupees 14,000 to be due to Mr. Tayler (*viz.* rupees 8,000 for balance of salary as a mooktear, and rupees 6,000 due as above), he is shewn to be indebted to the defendant to an amount exceeding that sum, which she alleges to be the case, and claims to set off against the plaintiff's claim a sum sufficient to cover it. The defendant alleges that rupees 33,600 were fraudulently taken from her Ticaree Cutcherry. She gives in her written statement particulars of set-off in this suit, and also in the cross-suit 421 of 1863 details of the amounts with dates and other particulars.

The plaintiff says, in a verified written reply to the written statement of the defendant: "I have had nothing to do with the collections of any estates belonging to the defendant, nor did I ever, as alleged by the defendant, realize rupees 33,650." What he meant by that statement it is difficult to say. His pleader suggested that, by this statement, he meant no more than that he had not realized it by fraud; but Mr. Tayler well knew that, if he got the defendant's money into his hands, he was bound to account for it. While admitting, as he does in the cross-suit, that he had received monies from the Ranee, he deliberately shrank from the issue, the proof of which lay upon him. "True, I got the money; but the several sums were due, and paid to me as gifts, or on accounts A, B, and C, and, therefore, cannot be brought into the general account." The defendant's witnesses distinctly state that these monies were paid to Mr. Tayler. They are not cross-examined. In his answer in the cross-suit, Mr. Tayler says,—"Such registers as are now kept were not prepared in 1860, by reason of your petitioner having just then commenced practising as pleader, for which nothing can be distinctly said as to the accuracy or inaccuracy of the amounts of the items specified at the foot of plaint, they not having been entered in a register; but whatever earnest-money, fees and rewards, were received by your petitioner in cases other than those alluded to in the bond, and the Ranee gladly paid the same through Hoormut Ally Dewan, after fully satisfying herself as to their justness. Under such circumstances how can she be entitled to a refund of such money as has been paid unconditionally from time to time as fees and rewards?" He, elsewhere in the same answer complains of certain delays that had taken place in payment of hoondees for rupees 5,000, drawn by Gunput Lall, a mahajun, which is one of those mentioned. In this deposition given in the petition against Khoorshed Ally, he says—"All the cases I conducted upon these terms, *viz.*, that Khoorshed Ally and Khoormut Ally the confidential and valued Dewan of the elder Ranee came to me in person, told me the particulars of the cases, settled the terms upon which *each was to be conducted*, and the amount of fees to be received by me, *and paid the same as unconditional fees*, either in cash or by hoondees on the Bankers at Gya, &c." He goes on to say, "my retainer was left in arrear."

Mr. Tayler, we have seen, was at the time the mooktear of the Ranee, working for her under the contract contained in the first hookoomnamah, by which he was to be paid by a salary of rupees 500 a month, and special gratifications in cases in which he was successful. Mr. Tayler chose to take his chance of preventing an enquiry into his accounts. He or his vakeel stood by, and allowed the Judge, in utter disregard of the evidence and of the admission on the record to pronounce that the cross-suit in which the Ranee sought to have the account investigated, was a "baseless sham got up for the *nonce* by way of meeting the defendant's plaint No. 15 with this puerile counter-charge." The Judge ended by committing the vakeel, the mooktear, and the mohurir of the Ranee, and several of the witnesses, for perjury, and dismissed the vakeel from his office.

After reversing these last orders, we remitted the case to the Lower Court, under Section 350, to enable the Ranee to give further and more detailed evidence in support of the alleged payment by her agents of rupees 33,650 to Mr. Tayler, and to give Mr. Tayler an opportunity of shewing, if he could, that he had any right to exclude these sums from the general account between himself and the Ranee.

The sums alleged by the Ranee to have been received by Mr. Tayler are as follow:—

1860, March 22nd, 15th Chyet 1267 F., Cash, Rs. ...	3,000
May 12th, 7th Jeyt 1267 F., Hoondee, Rs. ...	5,000
July 4th, 1st Srabun 1267 F., Hoondee, Rs. ...	5,000
Aug. 7th, 6th Bhadoor, Hoondee, Rs. ...	2,000
Sept. 1st, 1st Assin 1268 F., Tunka, Rs. ...	100

Sept. 25th, 25th Assin 1st 1268 F., Co.'s Rs. ...	500
Oct. 3rd, 5th Assin 2d. 1268 F., by Gunput Lall, Rs. ...	5,050
Oct. 13th, 15th Assin 2d. 1268 F., by Bechoo Lall, Rs. ...	3,000
Decr. 11th, 6th Augran, Hoondee, Rs.	2,000
Decr. 15th, 17th Augran, Bechoo Lall, Rs. ...	7,000
1861, Jany. 2nd, 5th Poos, Cash, ...	1,000
Total, Rs.	33,050

The last item of rupees 1,000 is said by Mr Tayler to have been paid to Dr. Allan on account of fees, and is abandoned.

March 22nd, 3,000 rupees. The sum of rupees 3,000 received by Mr. Tayler on the 22nd of March 1860 is stated to be the balance of rupees 5,000, which the Ranee agreed to pay when she appointed Mr. Tayler to be her mooktear. He says Khoorshed Ally came to him from the Ranee offering him a general power for the management of the litigation which was expected between her and the younger Ranee. Khoorshed Ally said he was commissioned to offer rupees 5,000 as a *chigoon* or offering of good omen. Rupees 2,000 was paid by Khoorshed Ally in cash at Ticcaree. It does not appear in the accounts—probably as Mr. Tayler says, because it was paid in cash at Ticcaree and sent direct from the Ranee's house. The balance was the sum of rupees 3,000 now in question. The plaintiff was then regularly engaged by the hookoomnamah, bearing date the 16th Cheyt 1267 F., already adverted to.

May 12th, rupees 5,000. We have next to deal with the sum of rupees 5,000, said to have been received by Mr. Tayler on the 12th of May 1860. After the death of Baboo Modenarain Singh, disputes arose between his widows, the elder and younger Ranees of Ticcaree. In order to settle these disputes, Mr. Tayler says that Hoormut Ally, the old family dewan, was appointed under an engagement and covenant signed by both Ranees, as the sole Dewan and manager of the estate, the covenanting parties agreeing that he should not be removed from his office except in consequence of a violation of the terms of his appointment. The most essential of these terms and conditions was that he should collect the entire rents, and pay in certain sums monthly for the use and purposes of the Ranees, keeping the rest in the treasury. Some months after the arrangements, however, the younger Ranee having become dissatisfied with Hoormut Ally, nominated one Bunded Ally to collect the rents of, and to manage, her 8 annas share, and presented a petition to the Magistrate, Mr. Simpson, stating that she had dismissed Hoormut Ally. Mr. Tayler says, "on receiving the petition, Mr. Simpson passed an order that she was at liberty to appoint her own dewan, and from that time supported her in the nomination of Bundeh Ally as regards separate collections." An appeal was presented to Mr. Trotter, the Judge. Mr. Tayler says—"The Judge in the body of his roobakaree, pronounced Mr. Simpson's orders to be illegal and improper. In the final order he did not use the word 'cancelled.' The Magistrate, therefore, did not consider that his order was reversed, and continued to lend his countenance to the separate management and collection of Bundeh Ally. The consequence was that the unhappy ryots were called upon to pay 24 annas in the rupee, and great confusion and trouble arose. It was at this crisis that I was engaged on behalf of the elder Ranee to take up her cases and fight for the maintenance of Hoormut Ally under the terms of his appointment." Mr. Tayler goes on to say—"The first suit committed to me was to get rid of Mr. Simpson's order and the distinct promise made to me by Khoorshed Ally and Dewan Hoormut Ally in person was that, if I should accomplish it, my *shukurana* should be rupees 10,000. I wish to point out that the order of Mr. Simpson, being still kept in force, was the foundation of all the Ranee's difficulties; that, until that was removed, there was no help except by suits in the Civil Court, which both parties wished to avoid, of Hoormut Ally's authority being maintained. The difficulty was peculiar, because no case was pending as above explained. The course that I took was this. I dictated to the Dewan himself a petition to present to the Magistrate, he and the other dewan having been called upon to put in their respective statements. I afterwards attended the Magistrate on an official visit in person, and then in virtue of my appointment, earnestly urged upon him with the strongest arguments I could use that it was his duty, as Magistrate, and responsible for the peace of the district and well being of the ryots, not to allow an order which the Appellate Court deliberately and judicially pronounced to be illegal, improper, and beyond the jurisdiction of the Magistrate, to remain in force, simply because of the omission of a formal word reversing the Magistrate's order. The

Magistrate admitted the force of all these arguments, but would not, on his own authority, interfere. He consented to represent the state of things officially, to the Judge, and to leave the Judge to explain his own order. The reference was made: the Judge explained his order, as intended to be a reversal; and on receipt of this, the Magistrate issued purwannahs, prohibiting the younger Ranee from maintaining a separate dewan for the separate collections. Then the first step in the controversy was gained. The parties appealed both to the Sudder and the Government; but no interference was exercised. My client was delighted, and gave immediate orders for the payment of the gratification promised me. The difficulty being removed of course, Hoormut Ally was in a manner restored to his authority, and any attempt made by the younger Ranee to collect separately, would obviously be made in the teeth of the authorities."

Mr. Tayler himself observes that no suit was pending in the Court of the Magistrate, and we may add that the so-called *official visit* and *conversation with* the Magistrate appears to have been an irregular proceeding, and particularly improper, considering the position which Mr. Tayler had there lately held as Commissioner of the district. Be that as it may, it is enough for our present purpose to say that Mr. Tayler gained the object for which he was employed, and consequently he became entitled to the rupees 10,000, which, he says, was paid him as a gratuity for a case won according to the terms of the hookoomnamah. Mr. Tayler says "my client issued orders for the immediate payment of the gratification promised me."

We are by no means sure that the whole of this sum of rupees 10,000 was not received by Mr. Tayler in addition to the monies mentioned in the plaint of the Ranee. A letter, dated the 25th of April 1861, written apparently by Hoormut Ally to Mr. Tayler, and produced by him, contains the following passage: "At present I am given to understand, from what the Doctor Saheb communicated to me, that in a short time, or within about three or four days, you will pay a visit to Sahibgunge. This news removed all anxiety from my mind. I, therefore, hope you will not fail to spend at least a day at Sahibgunge, when, according to your instructions, the mooktearnamah on the part of the sircar, and one-fourth of the promised sum, will immediately be made over to you. Besides, the performance of some other important affairs depends on your arrival." Chooramun Lall proves that, on the 7th of Jeyt, (12th of May) there is an entry of an item of rupees 5,100, of which rupees 5,000 was by a draft, rupees 50 on account of premium for cashing the same, and rupees 50 in cash, in the name of Mr. Tayler. It looks very much as if Mr. Tayler received this sum of rupees 5,000 as a fee on a separate mooktearnamah, and not as payment in part of the sum of rupees 10,000, of which he speaks; but as Mr. Tayler has not been cross-examined to explain it, he must be deemed entitled to the benefit of the sum.

On the 31st of May, we hear of a further payment of rupees 5,000, not charged in the Ranee's account. On that date Hoormut Ally writes to Mr. Tayler a letter which Mr. Tayler produces:—"Gentlemen of high dignity, and supporter of the helpless and needy, your shadow be prolonged, and I beg to communicate the object held in view. Two honor-imparting epistles having reached here through the post, have done great honor and afforded much succour. I have become fully acquainted with what was thereby addressed to (me), Chowdhree, who is waiting upon you, would give you a detailed account of the circumstances which caused a delay in the despatch of the hoondee, and rendered me unable to fulfil the promise. However, at present, nothing but the assistance of your honor is highly desirable inasmuch as the least attention on the part of your honor, as well as on the part of the Magistrate, will settle everything. If the matter be not soon settled by the Magistrate then a great anxiety and perplexity shall be experienced during the time of a new Magistrate. Such being the state of things, I hope that in a proper way such measures should be adopted, as would cause the disposal of the cases pending in the Criminal Court during the incumbency of the present Magistrate, and as would enable me to open the lock of the Cutcherry whereon everything depends. A hoondee for rupees 5,000, being the balance of the sum promised, is hereby remitted. Although a hoondee payable after 20 days has been drawn up in consequence of the exigency of the payment of Government Revenue, yet no difficulty shall be experienced in realizing the money covered by the hoondee in due time. All these things are stated with a view to give you information. As for the other affairs of this place, I believe Chowdhree Sahib will verbally en-

lighten you on the subject. The amount of salary, if it please God, shall be necessarily remitted after the payment of the Government Revenue, which would take a week, &c." This sum of rupees 5,000 appears to have been the balance of the sum of rupees 10,000, which Mr. Tayler alleges that the Ranee gave him for his success in the first suit as a separate fee. Mr. Tayler, in his evidence on the remand, speaking apparently of the Criminal case, and the order for the opening of the Cutcherry, alluded to in this letter, says—"I also, about this time, gave advice and assistance in several minor but not unimportant cases." Mr. Tayler further says—"I was only sent for by Hoormut Ally when any case of importance arose, in which my attendance was desired, and my part was only to plead or to present petitions according to their wishes and instructions, &c. In every case committed to me, an agreement was made for the remuneration to be paid me." The letter and the evidence might lead to the inference that the sum of rupees 5,000, appearing to have been remitted by a hoondee on the 31st of May, was a separate fee, and not the balance of the sum of rupees 10,000 admitted by Mr. Tayler to have been received in respect of the setting aside of Mr. Simpson's order. We are relieved from considering that question, by the fact that it is not included in the claim made by the Ranee. The letter leads to one of two inferences—either that the balance of the sum of rupees 10,000 was then remitted, or at any rate that no other sum was then due except the salary.

July 4th rupees 5,000. This was treated by Mr. Tayler's Counsel, as part of the rupees 10,000 already mentioned. Chooramun Lall proves that in the *jumma-khurach* relating to Mr. Tayler under date the 30th Assar, the sum of rupees 4,594 appears as paid to Mr. Tayler. The order was for rupees 5,015. The remaining rupees 44 was not paid on that date, as it was paid on a subsequent date. Mr. Tayler says—"Shortly after this, Mr. Palmer left the district and was succeeded by Mr. Wigram. Hoormut Ally again sent for me from Patna, begging to come down because Mr. Wigram had prohibited both Ranees from collecting the rents. I accordingly came down, presented a long English petition to Mr. Wigram, which I was informed afterwards by Hoormut Ally, had the desired effect of showing to him the real position of the litigant parties. * * * About this time Mr. Hollings, a gentleman, who resigned the Government service, was appointed by the younger Ranee on a salary of rupees 1,000 per mensem." On the 9th of June, Hoormut Ally writes to Mr. Tayler—"On the 8th of June, Friday, the new Magistrate came to Sahibgunge and received the charge of the Magistrate's office. At about 4 P. M., Mr. Palmer left this place, &c., * * * * Agreeably to what you had communicated to me, I am sure that, as you have taken on yourself the responsibility of conducting the cases connected with the estate of this Sircar, you will keep its interest in view, and do every thing in your power to promote it; and I trust that, on the arrival of the new Magistrate at Azimabad, an interview might have taken place between him and you, and you might have informed him of all the particulars relating to the Ticcaree case. * * * The Doctor and other sahibs deem it advisable that you should come to Sahibgunge for a day, and pay a visit to the new Magistrate, and do what is proper on the occasion, so that, like Mr. Palmer, the new Magistrate too should assist the Sircar." He promises to pay the expense conveyance, *i. e.*, of Mr. Tayler's coming from, and returning to, Patna. On the 14th of June the Ranee wrote to Hoormut Ally a letter, put in by Mr. Tayler, in which she requests Hoormut Ally to cause a letter to be written by the Doctor to Mr. Tayler. She says that she hears that the other side is making him handsome offers and desires Hoormut Ally to pay his salary and fee, and perform the promises that have been made to him. On the 21st of June, Hoormut Ally writes—"Your letter, dated the 18th of June from Chuprah, has reached me and realized my expectation. I have learnt its contents. Ere this, I sent you a letter covering the mooktearnamah and the letter of the Doctor; but I have not yet been honored with a reply to it. In the Criminal case, I was resolved to file a reply according to your suggestion on your arrival here. But the hakim insisted on my filing the reply at once, &c., I was compelled to file a reply yesterday. It has been my intention from the first to have the case postponed until your arrival. But being hard pressed by the hakim, I am in a fix, &c. * * * According to your instructions, I caused a representation to be made to the Magistrate through my mooktear, to the effect that in this suit a mooktearnamah on the part of the Maharanee Sahiba has been drawn up in your favor; that you have taken upon yourself the responsibility of all her cases; that you are about to come to this place; that so long

as you do not come, the case may be postponed." He adds: "I am given to understand that the Collector and the new Magistrate are on terms of intimacy with you. I feel an inward gratification and satisfaction."

It is clear that Mr. Tayler went to Gya respecting the matters alluded to in this letter, and apparently left it again before the 5th of July. On that day Hoormut Ally writes to Mr. Tayler, trusting that he had safely reached Chuprah, and sending him the draft of a petition to settle. He adds: "The hakim is of the same opinion he was before."

On the first of August, Hoormut Ally writes—"As I was ill for two weeks past, delay occurred in replying to your letters and remitting hoondee for the amount of your allowance; now I thank God I am perfectly recovered. I have enclosed you a hoondee for rupees 2,000, the amount of your allowance. Mr. Wigram is appointed Collector and Magistrate of Rajshahye. Another gentleman is coming here as Joint Magistrate and Deputy Collector of this district. It is a misfortune that two authorities, the Criminal and the fiscal, should be transferred at one and the same time. Mr. Wigram has formed a right and proper opinion of the law-suits of the Sircar since the day you saw and had a conference with him on the subject. But unfortunately he too is going away."

We think it clear that the rupees 5,000 charged as paid on the 4th of July, was no part of the sum of rupees 10,000, and that as it is not shown to have been a fee by way of gratification for a successful suit, it must come into the general account. Mr. Tayler's Vakeel and Counsel contended before us that, as a vakeel, he was at liberty to make any charges he pleased, if his client or her agent agreed to such charges at the time they were made. Had there been no contract between the parties we think that the contention might have been well founded. But while Mr. Tayler was acting under an engagement by which he was constituted the mooktear and legal adviser of the Ranee, he was bound by the same rules as an attorney would be. He could not take advantage of the weakness, the good nature, or the fears of his client. As the demand of an attorney would be limited to that reasonable remuneration which has been fixed by law or rules of the Courts, so the demand of Mr. Tayler, as mooktear, was limited to that which his original contract with his client provided for. If he was dissatisfied with the amount of his salary, he might at any time have thrown up the contract under which he was engaged, and the Ranee would then have had full time and opportunity to engage with another adviser, or enter into fresh terms with Mr. Tayler.

7th August, rupees 2,000. The sum of rupees 2,000 is shewn to be a payment on account of salary to which Mr. Tayler was clearly entitled under the terms of his agreement, and which appears to be referred to in Hoormut Ally's letter of the 1st August remiting that sum by hoondee.

1st September, rupees 100. The sum of rupees 100 Mr. Tayler admits. He says it was paid at his request to another party, but that it was subsequently deducted when other payments were made to him. But as we are now dealing with payments shewn to have been made without deduction, it must have been deducted from other sums which Mr. Tayler has not shown his right to receive. It must, therefore, be brought into account.

25th September, rupees 500. Mr. Tayler says—"The rupees 500 I cannot speak to positively. But I can speak to the payment of rupees 500, which must, I think, be this: The Ranee, on her satisfaction at my success, sent two little pearl necklaces with emerald drops. These drops turned out to be glass. On hearing of this she was distressed and sent Aolad Ally himself to me with rupees 500 begging my acceptance of the same" This sum, therefore, cannot be charged against Mr. Tayler, as it appears to have been a present for a successful case such as is contemplated by the hookoomnamah.

3rd October, rupees 550, 14th October, rupees 2,000. These sums appear to be part of three drafts for sums amounting on the whole to rupees 13,000, remitted by Hoormut Ally to Mr. Tayler by letter dated the 6th October. In a letter dated 2nd September 1860, after mentioning that two of the servants of the younger Ranee had been sentenced to three months' imprisonment and fine, that penal recognizance for good behaviour had been taken from the younger Ranee in the sum of rupees 1,000, and from Bundeh Ally and Beharee in the sum of rupees 200, and that he (Hoormut Ally) had obtained leave to remove the lock from the Cutcherry house, Hoormut Ally writes—"At present, it is necessary to attend to two things: *first*, to institute a suit for recovery of arrears of rent against one or two defendants, and obtain decree from the Summary Court; *second*, to have a penal recognizance

from the younger Ranee from the Criminal Court, so that she may not collect the rent and exercise tyranny and oppression on the rent-payers. The completion of such objects depends on your arrival. The Dusseerah is at hand and these matters are necessarily required to be attended to previous to the approaching vacation. I therefore request that you will be good enough to visit this place with all possible haste, so that they may be accomplished and the possession acquired through your blessing." On the 29th of September 1860, the hookoomnamah already mentioned, by which, as we have seen, sums of rupees 6,000 and rupees 5,000 respectively were fixed as the *khusmedee* to be paid to Mr. Tayler for success in carrying out these two objects. On the 6th of October Hoormut Ali remitted to Mr. Tayler three hoondees: one for rupees 5,000 payable immediately; one for rupees 3,000 due on the 8th of October: and the third for rupees 5,000, due on the 15th of Kartic. These monies appear to have been remitted unconditionally; Mr. Tayler must therefore, bring the sum of rupees 8,000 into account.

The Ranee by her plaint has not charged him with the remaining sum of rupees 5,000, and we, therefore, did not feel ourselves bound to compel him to refund this sum of rupees 5,000, which may be taken to represent the rupees 5,000 which was to be paid immediately on the execution of the hookoomnamah although this money also was taken contrary to the terms of his original engagement as mooktear of the Ranee. On the 21st of November, Hoormut Ally writes to Mr. Tayler—"At present it is essentially necessary that you should come over here. The Collector has stated that he would come to Ticcaree on the 28th November, and decide the Section 25 case on the 29th idem. When the Collector comes to Ticcaree and Sahibgunge, you will also be good enough to come to Ticcaree and Sahibgunge, either a day before or along with him, so that everything may properly be brought to a close. You should also consider that, when all the affairs of the Raj are left to your direction, you ought to see that no loss is sustained in any way by the Sircar. You write about your allowance already agreed to. What objection could there be to the payment thereof up to the present time? No objection has ever been raised to the payment of any thing promised to you; but it has always duly been paid. Whatever is in arrear, shall undoubtedly be paid, of which you may rest assured. You will be pleased to see the Collector without fail; put him right any how you can by suitable conversation; and come along with him after the month of November is over without hesitation; otherwise serious loss, which God forbid, is likely to happen to the Sircar for which you are to blame."

4th December, rupees 2,000. On the 4th of December, Hoormut Ally writes to Mr. Tayler, enclosing a hoondee of rupees, 2,000, for salary, requesting him to write to the Collector, naming the day when he would come to Ticcaree, so that the cases connected with the Raj should not be taken up in his absence. He adds, "the money promised is ready here; as soon as he will reach here, the same shall be presented to you."

17th Augran, rupees 7,000. Doorgapershad proves that the sum of rupees 7,000, was paid to Mr. Tayler on the 17th of Augran. This sum appears to have been paid either in respect of the first suits or two suits mentioned in the hookoomnamah of the 29th of September, which where heard before Mr. Morris on the 13th and 14th December, or on some separate account. We cannot, however, believe it to have been paid to Mr. Tayler on account of acts done by him in furtherance of the hookoomnamah of the 29th Assin 1268; without charging him with having in the present suit fraudulently demanded a sum already paid to him. This sum is either the reward he was to get for success under the hookoomnamah, or was a payment for which he has not given, or is unable to give any account, and therefore this item must be brought into account.

There is however another sum of rupees 2,000, paid on the 13th December not entered in the Ranee's statement of which Mr. Tayler gives the following account—"There was a case brought by Hoormut Alli against a defaulter which was pending when the great case was decided. On the evening of that day December 13th my dâks had been laid for Calcutta. When I was about to start with my family, Khoorshed Ally and Hoormut Ally waited upon me on the afternoon of the 13th, and expressing their congratulations on the great success we had achieved, mentioned to me this particular case which was to come on next day; the case was one in which the defendant had paid his rent to the younger Ranee during the confusion and set up her receipt as his acquittance. Had not the question of Hoormut Ally's sole

competency to sue been decided on the 13th, no doubt, the question would have been raised and argued in the case. As it was, this question had been set at rest; and we all agreed that the Collector would never think of making this particular defaulter pay his rent again; and therefore we felt sure that this particular claim would be dismissed. But Khoorshed Ally and Hoormut Ally expressed their apprehension that, in recording the order for dismissal through the inadvertence of the Collector, or perhaps some trickery on the part of the subordinates, some doubt might be thrown on the decision of the day before. They, therefore, pressed me to put off may dâk, to stay till the next day, and attend the hearing of the case in person; to watch the proceedings, and do my best, and prevent any such ambiguous expression; and they promised me a special fee of rupees 2,000 *which was paid that day* for the particular duty, and a reference to Mr Morris' roobokarry of that date, will show that a clause was inserted specially to guard against the idea that the order of dismissal in this particular case could interfere with his decision of the day previous." We have only to say that, under the terms of his agreement with the Ranee, Mr Tayler had no right to make a bargain for any such fee, otherwise than conditionally upon the success of the suit; and, as he took the fee for looking after the suit to which, under his retainer and the hookoomnamah, he was bound to attend, it must have been disallowed and brought into the general account had the Ranee claimed it. But as she has not claimed this sum, but apparently only a sum of rupees 2,000 paid on 4th December, which, as we have seen, was salary, we do not think it necessary to allow it to her.

Mr. Tayler is chargeable with the sum of rupees 5,000 received July 4th, the sum of rupees 100 on the 1st of September, the sum of rupees 8,000 on the 14th October, and the sum of rupees 7,000 on the 15th of December, total rupees 20,100; and as his claim against the Ranee as shown above is rupees 14,000, Mr. Tayler's suit must be dismissed with costs, and the Ranee will recover in the cross-suit, No. 421 of 1863, the sum of rupees 6,110 with costs.

Interest will run from the date of the decree.

The 3rd May 1865.

Present:

The Hon'ble W. Morgan and Shumboonath Pundit, *Judges.*

Hindoo Widow (succession of—to property postponed in enjoyment by husband).

Case No. 2587 of 1864.

Special Appeal from a decision passed by Mr. C. S. Belli, Judge of Rajshahye, dated the 17th August 1864, *reversing a decision of Baboo Anund Chunder Banerjee, Principal, Sudder Ameen of that District, dated the* 13*th March* 1863.

Hurrosoondery Debea Chowdranee (Plaintiff), *Appellant,*

versus

Rajessuree Dabea (Defendant), *Respondent.*

Baboos Onoocool Chunder Mookerjee, Dwarkanath Mitter, and *Sreenath Doss* for Appellant.

Baboos Unnoda Pershad Banerjee, Mohendro Lall Shome, Debendro Narain Bose, and Mohinee Mohun Roy for Respondent.

The doctrine of the Hindoo Law that a widow, succeeding as heir to her husband, cannot recover property of which he was not possessed, is inapplicable when the husband has a vested interest under a will or deed, the actual enjoyment being postponed.

Comul Lochun Chowdry died in 1211 without male issue, leaving him surviving two widows, Shoobadiah Dabea and Wooma Dabea, and a daughter, the defendant Rajessuree. The two widows registered their names as the proprietors of certain lands belonging to Comul Lochun; and in 1213 Shoobadiah died, having given to her brother Bissessur what she deemed to be her share of the property; Bissessur obtained registration of his name in the Collectorate as the propietor, and afterwards, by a deed of gift, made over to Rajessuree a portion of what had been given to him by his sister. Wooma Dabea, the other widow, put forward a written authority from her deceased husband to adopt a son by virtue of which she in or before the year 1219 adopted Issen Chunder, who attained his majority in 1237, and died in 1246, leaving his widow, the plaintiff in this suit, and his adopting mother Wooma Dabea, him surviving. Wooma Dabea died in 1264, leaving her daughter Rajessuree, who, with her two sons, are the defendants in the suit. That Comul Lochun gave his widow, Wooma Dabea, authority to adopt a son, and that

she adopted Issen Chunder, must now be taken as fully established. The document itself, conferring the authority, was produced in Court by Wooma Dabea in a suit many years ago, where it was allowed to remain, and has since been lost. Its terms have not been, and perhaps cannot now be, precisely ascertained. The Principal Sudder Ameen, who first tried the suit, and disposed of it in a judgment, which is for the most part based on sound reasons, and on grounds more satisfactory to us than those given by the Lower Appellate Court in the judgment by which this decision was reversed, came to the conclusion that the document contained a provision giving to Wooma Dabea a right to retain the property for her life, and postponing the right of the adopted son to hold the property until his mother's death. It is clear that Wooma Dabea had, in fact, after the adoption, and after the majority of the adopted son, continued in possession of the property; and that she held the property until her death. On her death her daughter, the defendant Rajessuree, obtained possession. Before her death Wooma Dabea and the plaintiff were parties to a proceeding before the Magistrate under Act. IV of 1840, in which the plaintiff asserting that her husband had held possession as an adopted son, and that she, by his death, had succeeded to the possession claimed to be either maintained in, or restored to, the possession of which she alleged that Wooma Dabea had deprived her.

A document called a "Bazeenamah," dated the 12th August 1832, was produced by Wooma Dabea in that proceeding. This document had been filed by Issen Chunder in a suit brought by him in 1832 against Rajessuree for some part of the property left by Comul Lochun (which his widow Shoobadiah had given to her brother Bissessur, and he had afterwards given to Rajessuree), and contained a statement by him that he had no right of suit in respect of the property during the life-time of Wooma Dabea. The Magistrate was satisfied that Wooma Dabea held possession, and that her possession must be maintained. Hurrosoondery's (the present plaintiff's) statements on that occasion, that her husband was in possession, and that she had succeeded to his possession, and that the bazeenamah was a spurious document which had never been filed by her husband, were all disbelieved.

The suit now before us was instituted for the recovery of the land. As to the portion of it which had been acquired by the defendants, and previously by Bissessur under a deed of gift, the Principal Sudder Ameen decided the plaintiff's suit was barred by limitation, and this part of his decree is admittedly correct, and is not disputed.

The remainder of the land was decreed to the plaintiff, on the ground that Wooma Dabea's authority to adopt, and the adoption of the plaintiff's husband having been established, the plaintiff, as his heir, was entitled to obtain possession of the property upon the determination of the life-interest which was given to Wooma Dabea. This decision was reversed by the Judge. The ground of the reversal is thus stated in his judgment:—

"The plaintiff was, I consider, bound to "bring her action for reversal of the Magis-"trate's order and recovery of possession of "the property in the form in which she had "propounded her case before the Magistrate. "By the present law, Act XIV of 1859, "which governs this case, she had three "years to bring her action from the date of "the Magistrate's order which was passed "in 1856, whereas this suit was instituted "in 1862. She is, therefore, beyond time, "and her case must be dismissed."

The Judge considered that the plaintiff must abide by the title which she had set forth in the dispute before the Magistrate, that is, that her husband being in possession as the adopted son of Comul Lochun, she had succeeded to the possession after her husband's death; and further, that her suit must be regarded as a party bound by an order respecting the possession of property made under Act IV of 1840, to recover the property comprised in the order (Act XIV of 1859 Section 1 Clause 7). On a special appeal to this Court the Judge's decision was reversed, and the case remanded for trial. It has again been decided in the defendant's favor, the Judge stating—"I am in-"clined to think that Issen Chunder, for some "purpose or other, it would be as impossible "as useless to conjecture what, did renounce "in favor of his adoptive mother the patri-"mony which was his by right on attain-"ment of majority, and that consequently "plaintiff has lost all title by effluxion of "time to succeeed to it as his heir."

The Judge's former decision held that the suit was barred by the three years' limitation. It was on that point of law alone that the case was argued, and decided by us in special appeal. But the Judge also commented on a portion of the judgment of the Court of first instance, which declar-

ed the right of the plaintiff as heir to her husband, to succeed to the property upon the death of Wooma Dabea. The Principal Sudder Ameen's finding that the *unnomutto puttro* contained a provision that Wooma Dabea should retain possession during her life-time, was not questioned; but the Judge intimated his opinion that the right of Issen Chunder, the adopted son, was contingent on his surviving Wooma Dabea; and that, as he died before her, the inheritance lapsed, and the plaintiff took nothing. This part of the judgment of the Lower Appellate Court was not noticed in our decision, nor was it, we believe, the subject of any argument before us; but it is referred to in the Judge's second decision, which is now before us in special appeal From this last decision we learn that the Judge has, since the remand, satisfied himself from the evidence that the *unnomutto puttro* contained such a provision. Whether it did or not, the plaintiff's suit must, in the Judge's opinion, be dismissed; in the former case, because the interest of Issen Chunder was contingent on his surviving Wooma Dabea, and failed by his death in her life-time; and in the latter case, for the reason stated in the above quoted passage of the judgment, which we understand to be in effect that her suit is barred by limitation. We cannot, in a special appeal, question the conclusions of the Lower Courts from the evidence. We can only interfere with their decision of matters of fact if there has been a substantially defective investigation leading to an erroneous decision of the suit upon the merits. We are not satisfied with the Judge's mode of treating that portion of the evidence (for the first time taken into consideration by him after the remand it would seem) which relates to the existence in the *unnomutto puttro* of the provision giving a life-estate to Wooma Dabea. The adoption of Issen Chunder, and that he attained his majority, were established. It was also clear that his adopting mother, Wooma Dabea, in fact, continued in possession of the property. The Principal Sudder Ameen thought that her possession was to be referred to the provision in the *unnomutto puttro*, which entitled her to retain possession for her life. The only other modes of accounting for her possession were that she held possession adversely to Issen Chunder, or that he had consented to her retaining the property. Issen Chunder himself, in the bazeenamah which was admittedly given by him, had stated that her possession was by virtue of the provision in the *unnomutto puttro*. Wooma Dabea had herself adduced this written acknowledgment by Issen Chunder to support her case before the Magistrate. The Judge disposes of this important evidence by the remark that "Issen Chunder, "for some purpose or other, it would be as "impossible as useless to conjecture what, "did renounce in favor of his adoptive "mother the patrimony which was his by "right on attainment of majority." And he set aside the bazeenamah with the observation that the plaintiff had at one time "repudiated the document on the authenticity "of which her claim entirely depends, and "her denial neutralizes the force of her "husband's admission." The plaintiff's conduct in asserting inconsistent claims, and supporting them by falsehoods, may materially affect her credit, and may justly expose her to punishment if her misconduct falls within reach of the Penal Law. But she is nevertheless entitled to obtain from the Court a fair hearing of her suit, and a due consideration of the evidence. The statement by Issen Chunder in the bazeenamah, and the use of that document subsequently by Wooma Dabea was independent evidence of an important kind, which could not be set aside or affected by any falsehood which the plaintiff may have resorted to in the proceedings before the Magistrate. Again, the fact that Wooma Dabea's possession of the property continued after her adopted son's majority, with the important bearing of that fact on the Principal Sudder Ameen's conclusion that a provision, giving her a life-interest was contained in the *unnomutto puttro*, required a fuller consideration than the Judge's remark that "for some purpose or other, it "would be as impossible as useless to con"jecture what, Issen Chunder renounced "the property in favor of his adoptive mo"ther." The probability of a voluntary renunciation by an adopted son of the whole of the property in favor of his adopting mother was a most important consideration, especially when viewed with his statement in the subsequent bazeenamah.

Although we are of opinion that the Judge's investigation is substantially defective in this respect, we think the case may be decided without the necessity of a further remand. If the adopted son, on attaining his majority, allowed his mother to continue in possession of the property, it is clear upon the admitted evidence that he relinquished to her only the possession for

her life; and that subject to such possession by her, the property remained his, and on his death to his widow, who, upon the death of Wooma Dabea, became entitled to obtain possession. This is on the assumption that the deed did not contain the disputed provision. If the deed contained such a provision, its legal operation would be (unless expressed in very special terms such as we should not be justified in assuming) to give to the adopted son a vested right to the estate, postponing his actual enjoyment of the profits until the widow's death. In either view, the estate was his, and passed to his widow upon his death.

The Judge cites authorities to show that a widow does not represent her husband in respect of succession to an estate which would have devolved upon her husband, had he out-lived its owner, but can only take, as her husband's heir such property as he possessed or was entitled to when he died. The rule, as stated, cannot affect the present case in which the interest of the adopted son, at the time of his death, was not merely the expectant interest of an heir, nor an interest contingent on his out-living his mother (as the Judge supposes), but a vested and absolute interest in the property postponed in enjoyment during the life-time of Wooma Dabea. Whatever may be the precise extent and meaning of the doctrine of the Hindoo Law that a widow succeeding as heir to her husband cannot recover property of which he was not possessed, it is inapplicable when the husband has a vested interest under a will or deed, the actual enjoyment being postponed (*See* 54 Moore's Indian Appeals, 176).

We reverse with costs the judgment of the Lower Appellate Court, and affirm the Principal Sudder Ameen's judgment.

The 3rd May 1865.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Alluvial Lands—Proof of title—Gozeshta rights.

Case No. 426 of 1864.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Shahabad, dated the 26th August 1864.

Mem Rakhan Roy and others (Plaintiffs), *Appellants,*

versus

Ram Dhyan Misser and others (Defendants), *Respondents.*

Baboos Mohesh Chunder Chowdhry and *Dwarkanath Mitter* for Appellants.

Moonshee Ameer Ali and *Baboos Kalee Mohun Doss, Onoocool Chunder Mookerjee,* and *Unnoda Pershad Banerjee* for Respondents.

The plaintiff and the defendant both claimed possession of certain lands under grants from A the Zemindar. A supported the plaintiff's case, and wholly repudiated and denied the defendant's title. The defendant not being able to prove his title, HELD that plaintiff was entitled to a decree.

WE are of opinion that the judgment appealed against ought to be reversed.

The suit is for possession of certain chur lands. The plaintiffs (the appellants in this Court) claim under a lease from the admitted proprietor of the lands, Maharajah Mohessur Bux Singh. The respondents also make their title through the Maharajah, claiming the lands as part of their ancestral *gozeshta* lands held by them and their ancestors for several generations. Their case is that a portion of their *gozeshta* lands disappeared and was lost to them by diluvion; but that the disputed ground is the re-formation of these *very* lands, and therefore that they were entitled to resume possession of them, as they did, as soon as they became fit for cultivation. The Maharajah is a party to the suit, and has filed a written statement, supporting the appellant's title, and denying that of the respondents.

The Lower Court considered that the defendants had sufficiently proved the *gozeshta* title set up by them, and dismissed the suit. We think that the defendants' title is not proved, and that the plaintiffs are entitled to judgment.

As all the claimants admittedly claim through the Maharajah, and as he supports the lease granted by him to the plaintiffs and repudiates the title of the defendants, it was clearly necessary for the defendants to prove their case fully and distinctly. This they have not done. If they had really held these lands in the manner alleged by them, they must have been able to produce some kind of documentary evidence to prove their having done so, and also to prove what land in particular it was that they did possess. But we have no documentary evidence to go upon, and there is absolutely no precise or detailed evidence at all as to the possession, diluvion, re-formation and re-possession of the lands which the defendants are supposed to have occupied prior and subsequent to the diluvion. There is no reliable proof, in fact,

to support the case of the defendants, save the vague statements of a series of witnesses, who say severally that the defendants did for many years have *gozeshta* lands, that they were lost by diluvion, and that the lands now in dispute are a re-formation of those very lands. It is true a few receipts for rent have been put in ; but they are so few in number, and of such recent date, and for such small amounts, that they do little or nothing towards establishing that which the defendants have to prove.

The Lower Court considered that the Maharajah had, in certain former proceedings, admitted that the defendants held the land in the manner now alleged by them, and the Court placed much reliance on this admission. No doubt, if the Maharajah had been proved ever to have admitted the defendants' title as *gozeshtadars*, it would have gone far to prove their case now. But in none of the proceedings referred to can we find an admission of their having ever been any title whatever in the defendants. We have heard all the papers read, and can find no admissions, favorable to the defendants.

In the absence of any admission by the Maharajah of the defendants having ever had any *gozeshta* rights in the absence of any precise or satisfactory documentary evidence that such rights ever existed, or that defendants had possession under them of the lands in dispute prior and subsequent to their diluvion, and in the face of the Maharajah's express denial that any such rights exist, we think it impossible to hold the defendants' case to be proved merely on the very vague and unsatisfactory general statements made by the witnesses who were examined. We, therefore, reverse the decision of the Lower Court, and give judgment in favor of the plaintiffs with costs.

Other pleas were argued in the course of the hearing, but under the circumstances above set forth, it becomes unnecessary to notice them further.

The 4th May 1865.

Present :

The Hon'ble E. Jackson and F. A. Glover, *Judges.*

Joint undivided property—Suit by one co-proprietor (to cancel meeras pottah and recover his share)—Possession—Perpetual leases (by Guardians).

Case No. 3610 of 1864.

Special Appeal from a decision passed by the Principal Sudder Ameen of Dacca, dated the 12th September 1864, affirming a decision passed by the Moonsiff of that District, dated the 24th November 1863.

Oddoyto Chunder Koondoo (one of the Defendants), *Appellant,*

versus

Prosunno Coomar Bhuttacharjee (Plaintiff), and others (Defendants), *Respondents.*

Baboo Obhoy Churn Bose for Appellant.

None for Respondents.

A decree in favor of one co-proprietor of joint undivided talook, suing alone to cancel a meeras pottah granted during his minority, and to recover his share of property, does not necessarily give actual manual possession of the share, but only the right to collect the rents of that share direct from the ryots irrespective of the pottah.

A guardian cannot grant his ward's lands in perpetuity except on clear proof of benefit to the minor.

THIS was a suit on the part of one of a number of co-proprietors of a talook to cancel meerâs pottah held by the defendants, and to recover his share of the property. The other shareholders refused to join in the suit and were made defendants.

The special respondent was, it appears, a minor at the time the pottah was given, and his guardian joined the other proprietors in the conveyance.

The Principal Sudder Ameen held that the plaintiff was not bound by the pottah, and decreed to him his share of the land, with wasilat.

It is urged in special appeal (1) that as the talook was a joint undivided property, the decree given by the Lower Appellate Court is impossible of execution; and (2) that as the special appellant purchased for a valuable consideration *bonâ fide* of the ostensible proprietors, he cannot now be turned out of his rights by the special respondent whose guardian agreed in the transfer of the land.

With regard to the first objection, we think that the special appellant has mistaken the meaning of the Lower Court's decision. The plaint was not for actual manual possession of a 2 annas 13 gds. 1. c. 1 krant share of the talook, but for the right to collect rents from that share direct from the ryots irrespective of the meerasee pottah. There would be no difficulty in executing a decree of this sort. Manual possession of the share could not, of course, be given without the talook being partitioned by butwara;

but a share of the rents, as collected direct from the ryots, might pass by decree, and this is what the Principal Sudder Ameen has awarded. He has cancelled the meerasee pottah so far as regards the special respondent, which is the same thing as giving the latter the privilege of dealing direct with his tenants without the intervention of a middleman in the shape of a meerasdar.

With regard to the second objection, we observe that a guardian would have no right to give away his ward's land in perpetuity, unless on the most distinct proof that his doing so would benefit the minor. In the present instance, no such proof is afforded. No assertion is even made that such was the reason of the transfer; and, under these circumstances, the presumption would be against the guardian's *bonâ fides*, and there would be nothing to bind the ward, when he became of age, from disputing, with a view to cancelment, any such unwarranted engagement.

We dismiss the appeal without costs as the special respondent has not appeared.

The 4th May 1865.

Present :

The Hon'ble E. Jackson and F. A. Glover, *Judges.*

Enhancement of rent—Summary decrees (no proof of variation).

Case No. 3639 of 1864.

Special Appeal from a decision passed by the Additional of Judge of Jessore, dated the 10th September 1864, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 31st July 1862.

Kalee Kant Roy and others (Plaintiffs), *Appellants,*

versus

Bibee Ashrufoonisa and others (Defendants), *Respondents.*

Baboos Anund Chunder Gossal and *Nursingh Narain Mitter* for Appellants.

Baboo Greeja Sunkur Mojoomdar for Respondents.

In a suit for enhancement, *ex-parte* summary decree are not satisfactory proof that a variation has taken place in the amount of the rent paid.

THIS was a suit for enhancement of rent. The Judge has found that the tenure is of very ancient origin, and the rent has remained unchanged from long before the Decennial Settlement.

The plaintiff, on special appeal, points out that he had produced *ex-parte* summary decrees and a petition put in by the tenants in execution of one of those decrees admitting the liability under it, and shewing that the rent had varied.

The Judge distrusts this alleged admission, and rejects the summary decrees as no proof that any real variation had taken place in the amount of the rent paid. And, we think, he is quite right to do so. It is most improbable that the tenants would, under the circumstances, have allowed their right to fall in abeyance; and it is most likely that the proceedings in question were secret, fraudulent, and carried on in the absence of the tenants.

The 4th May 1865.

Present :

The Hon'ble H. V. Bayley and F. A. Glover, *Judges.*

Widow (claims to property left by)—Onus probandi—Adoption.

Case No. 452 of 1864.

Regular Appeal from a decision passed by Baboo Anund Chunder Banerjee, Principal Sudder Ameen of Rajshahye, dated the 12th September 1864.

Bissessur Chuckerbutty and others (Plaintiffs), *Appellants,*

versus

Ram Joy Mojoomdar, guardian of Chunder Nath *alias* Ram Chunder Chuckerbutty, and others (Defendants), *Respondents.*

Baboos Dwarkanath Mitter and *Mohinee Mohun Roy* for Appellants.

Baboos Gopal Lall Mitter and *Mohendro Lal Shome* for Respondents.

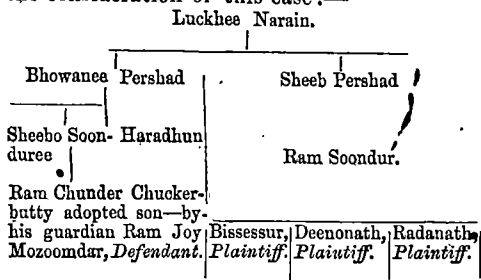
Suit laid at rupees 22,749-0 as. 11gds. 2c.

When a widow dies possessed of property, it is for those who claim it adversely to the natural heirs and against the presumption that the widow has acquired at least the nucleus from her husband, to prove their special pleas and to shew that it came into her hands from other sources.

In a suit by the natural heirs, if the defendant sets up a preferential hereditary right by virtue of adoption, he must prove his adoption.

THIS was a suit to recover certain real and personal property, valued at Rupees 22,749-0-11½gds. by setting aside an alleged adoption

The following genealogical table will assist the consideration of this case:—



Luckhee Narain, the common ancestor, had two sons, Bhowanee and Sheeb; the former left one son, Haradhun, who died in 1233, leaving, as is alleged, his widow Sheebo Soonduree with power to adopt. She died in 1260, having exercised that power in 1257 in favor of Ram Chunder.

The plaintiffs in this suit (appellants before us) claim to succeed to the property left by their cousin Haradhun through their father Ram Soondur as nearest of kin, and to recover that property from the hands of Ram Chunder, on the ground that the adoption was never made.

The defendant pleaded the adoption by Sheebo Soonduree, and that, as the plaintiffs had not sued within 12 years of its date, they were barred by limitation; and added that Haradhun died possessed of no property beyond a few utensils and a dwelling-house, which were appropriated on his death by other parties; and that all the property now in suit, save a 10 anna share of Pergunnah Shahapore, which was given to him by his father-in-law, Kalee Chunder Bhoonick, was acquired partly by his adoptive mother, Sheebo Soonduree, with her own streedhun, money given her by her relative Ranee Huree Preea, and partly by himself after her death.

The Principal Sudder Ameen, after disposing of the plea of limitation against the defendant, held that, as the plaintiff had not been able to show that Haradhun died possessed of any property, the present suit would not lie, and that no enquiry into the other points at issue was necessary.

Both parties appeal against this order; the plaintiffs appeal regularly, and the defendant pleads an objection under Section 348.

The latter may be disposed of very shortly. The defendant's argument is that as the plaintiffs admit that the adoption took place in 1257, and that this suit was not brought till more than 12 years from that date, they are, therefore, out of time.

But this, we observe, is untenable; for so far from the plaintiffs admitting that the adoption took place in 1257, they deny that any adoption took place at all. And as the Principal Sudder Ameen has not taken the question into consideration, and has passed no judgment upon it, the point, as to whether there was or was not an adoption of the defendant Ram Chunder, is altogether undisposed of, and that being so, it is clearly impossible to adjudicate on the question of limitation, which depends wholly and solely upon it. Moreover, supposing the facts to be as stated, Ram Chunder's right would not accrue till after Sheebo Soonduree's death, from which date the plaintiffs are undoubtedly within time. So that in no point of view is the objection tenable.

The plaintiffs appeal on the ground—(1) that as they are the legal heirs of Sheebo Soonduree as well as of her husband Haradhun, their title to suceeed could only be defeated by the defendant proving his adoption; and that as the Principal Sudder Ameen has not tried this issue, his judgment is in complete, and his decree cannot stand.

(2). That the Principal Sadder Ameen was wrong in throwing upon them the *onus* of proving that the property in suit had been acquired by Haradhun, instead of calling upon the defendant to support his special plea that it was acquired by Sheebo Soonduree with her own 'streedhun'; and

(3). That even if it were shewn to be wholly, or in part, her 'streedhun', plaintiffs would, on the failure of proof of the adoption, be the preferential heirs to it as such streedhun, and that, therefore, without enquiry into the fact of the adoption, no part of the case could be decided.

We think that, on the whole pleadings, there can be no doubt that the plaintiffs sued not only as the nearest of kin to Haradhun, and therefore entitled to succeed to his property, but as heirs to Sheebo Sunduree also, *i. e.*, claiming to follow what had been Haradhun's into the hands of Sheebo Soonduree, and what she might have died possessed of, either through her husband directly, or by her own exertions based upon what she had succeeded to from her husband as nearest reversioners; and we think also that, under the circumstances, the presumption of law that the property left by Sheebo Soonduree was acquired either directly from that left to her by her husband, or indirectly by speculating with that property as a nucleus, and so increasing it, is in the appellant's favor; and that, when

a Hindoo widow dies possessed of property, it is for those who claim it adversely to the natural heirs and against the presumption, fully to prove their special pleas, and to show that it came into the widow's hands from other sources.

In the present case, it was for Ram Chunder to prove that the nucleus of the property now sought to be recovered was Sheebo Soonduree's 'streedhun.'

But even were it proved that Sheebo Soonduree formed this nucleus herself and was in no way indebted to her husband's estate for it, still the Principal Sudder Ameen's decision would be equally incomplete, inasmuch as the respondent could have no possible claim to it unless he proved his adoption; and although the Principal Sudder Ameen laid down two issues affecting the question, he decided neither of them. (There is, we observe, some mention of a will in the pleadings, but as it has not been produced, and has formed no ground of the Lower Court's decision, we need not notice it here).

We think, therefore, that the case must be remanded, on the ground that as the appellants sued as heirs both of Haradhun and Sheeboo Soonduree, and as at least, the nucleus of the property now in suit was in Sheebo Soondu[illegible]ee's possession during her life-time, the defence to the action is a preferential hereditary right, and that the respondent, who asserts that right in consequence of his adoption, must prove that adoption.

If this be proved in favor of the respondent, the case would go no farther, and the respondent will, of course, be entitled to succeed to the whole of his adoptive father's and mother's property. If not, the question of streedhun will have to be considered, how much of the property was Sheebo Soonduree's own particular property; and then further, the point whether or no the appellants are not the preferential heirs of that streedhun, and of all acquired by it, or to what extent.

Costs will follow the result.

The 4th January 1865.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and Shumbhoonauth Pundit, *Puisne Judge.*

Admissions (How long and how far binding)—Onus Probandi (Ameen's report).

Case No. 2290 of 1864 under Act X of 1859.

Special Appeal from a decision passed by Mr. H. B. Lawford, Officiating Additional Judge of Jessore, dated the 21st May 1864, *reversing a decision passed by the Moonsiff, exercising the powers of a Deputy Collector of that District, dated the 6th October* 1863.

Gowree Narain Mozoomdar and others, (Plaintiffs), *Appellants,*

versus

Modhoosoodun Dutt and others (Defendants), *Respondents.*

Baboo Banee Madhub Banerjee for Appellants.

Baboo Chunder Madhub Ghose for Respondents.

An admission once made is binding against the party making it for all the purposes of the suit, unless the admission is shown to have been recorded erroneously.

The onus is on the defendants to impeach, and not on the plaintiffs to call evidence to support an Ameen's report.

THIS is a suit for the rent of 10½ cottahs of land in the bazar of Koteechandpore at an enhanced rate after service of notice.

The ground of enhancement in the notice was that the land which was held as 6 cottahs at a rent of Rupees 13, 15 annas, and 8 gundahs, was on measurement found to consist of 10½ cottahs; that the value of land and its productive power had increased otherwise than by the agency of the defendants; and therefore the plaintiffs, according to the prevailing rates, claimed a rent of Rupees 31-8.

The first Court gave the plaintiffs a decree for this sum, acting on the report of an Ameen, and recording the fact that a kubooleut produced by the plaintiffs had been admitted by the defendant's mookhtear.

The Judge reverses this decision. He says that the kubooleut was not proved in any way.

As to this point, he appears wholly to overlook the fact that the Moonsiff records that it was admitted in the first Court. The defendants, in their grounds of appeal before the Judge, nowhere object that such admission was recorded erroneously. And unless this is shewn to have been the case, an admission once made is binding against the party making it for all the purposes of the suit.

Secondly, he seems to think that no reasons are given for making the demand.

But we think that the facts that the defendants were holding more land than they were paying for, and that the present value of the land in the bazar is greater than the rent paid, are abundant reasons for enhancing the rent, and are sufficiently stated in the notice of enhancement to make it a good notice within Section 13 Act X of 1859.

We think that the Judge was scarcely justified in treating the Ameen's report as he has done. He complains that the plaintiffs produced no single man of note to show the increased value of the land in Koteechandpore. But it was for the defendants to impeach, and not for the plaintiffs to call evidence to support the Ameen's report.

The defendants appear not to be ryots at all, and, therefore, to be persons to whose case Section 17 has no application.

With these observations we remand the case for trial upon the issues, what is the quantity of land held by the defendants, and what are the prevailing rates for such land as they occupy.

The 4th January 1865.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and Shumboonauth Pundit, *Puisne Judge.*

Rights of occupancy (Forfeiture of).

Case No. 2293 of 1864.

Special Appeal from a decision passed by Mr. H. C. Richardson, Judge of Bhaugul-

pore, dated the 20th May 1864, *reversing a decision of Moulvie Syud Mahomed Rafeq Khan Bahadoor, Principal Sudder Ameen of that District, dated the 14th May* 1861.

Mirza Nadir Beg (Plaintiff), *Appellant,*

versus

Muddurram and others, (Defendants), *Respondents.*

Mr. John Baptist for Appellant.

Mr. A. F. Lingham for Respondent.

The setting up of a hostile title against the zemindar by a tenant under a pottah found to be fraudulent amounts to a disclaimer and forfeiture of all rights of occupancy to which the tenant might have been entitled, had he set up his title under Section 6 Act X of 1859.

In this case plaintiff alleges possession of certain lands from 1846, and might possibly have been entitled to a right of occupancy, had he set up a title under Section 6 of Act X of 1859.

But he took a pottah found to be a fraudulent one, and under that set up a hostile title as against the representative of the zemindar.

That act amounts to a disclaimer and forfeiture of all his rights of occupancy, and the Judge has therefore very properly decreed khas possession of the land to the zemindar.

This appeal is, therefore, dismissed with costs.

Mr. Justice Shumbhoonauth Pundit.—I further add that I read the Judge to mean that the whole transaction of this lease was altogether a fictitious matter and so there could be no possesion at all.

The 5th January 1865.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Puisne Judges.*

Presumption of occupancy before Permanent Settlement.

Case No. 1890 of 1864 under Act X of 1859.

Special Appeal from a decision passed by Mr. A. Pigon, Judge of Hooghly, dated the 5th April 1864, *affirming a decision passed by Moulvie Deen Mahomed Khan, Deputy Collector of that District, dated the 30th September* 1863.

Ram Coomar Mookerjee (Plaintiff), *Appellant,*

versus

Ragub Mundul (Defendant), *Respondent.*

Baboo Noboo Kishen Mookerje for Appellant.

Baboo Gopal Lall Mitter for Respondent.

The presumption sanctioned by Section 4 Act X of 1859 only applies to a case in which existing circumstances are stated to have been continued from the Decennial Settlement, and proof of such continuance for more than 20 years is given. In the present case the existence of present circumstances, dates from 1245; and as it was asserted by the defendant that present circumstances were only a re-arrangement of the prior ones (the rate of rent to be paid being left untouched), the truth or otherwise of that assertion ought to have been enquired into by the Judge.

Plaintiff sued for arrears of rent at an enhanced rent after service of notice.

Defendant pleaded that his ancestors, on the 13th Chyet 1173, obtained a pottah for 7-3 at a rent of 19-12-6, and on the 7th Chyet 1173 another pottah for 62-7 at 60 Rupees; that they continued to pay the same rent on the two jummas up to 1245; that in that year, with the consent of the zemindar, the two jummas were consolidated, and then divided into three separate jummas, each bearing one-third of the rent formerly borne by the two jummas; that this consolidation and subsequent division was sanctioned by the zemindar and registered in his serishtah; that consequently as they have paid the same rent from before the Decennial Settlement, they were entitled to pay the same in perpetuity, and plaintiff's suit should be dismissed.

The Deputy Collector was of opinion that from the evidence on the record, it was clearly proved that defendant's ancestors and defendant had held possession of this land for 100 years; that the consolidation of the original jummas in 1245, and their subsequent division, left the rate payable on them untouched; that consequently the new arrangement could not be considered a new set of circumstances, but the old one in an altered form; and being such, plaintiff's suit must be dismissed, he having no right to enhance the defendant's rent.

The Judge on appeal simply found that, as the defendants have paid the same rent for 20 years before the institution of the present suit, the legal presumption sanctioned by Section 4 Act X of 1859, *viz.*, that they have paid the same from the Decennial Settlement, arises; and that, consequently, plaintiff's suit must

be dismissed. He, therefore, dismissed the plaintiff's claim.

Plaintiff now appeals specially, urging that the presumption mentioned in Section 4 of Act X of 1859, can only arise when the continuance of the same circumstances from the Decennial Settlement is pleaded, and proof is given that they have continued for 20 years, such proof being sufficient to warrant the presumption of the continuance of the same circumstances for a longer period; but in the present case it is admitted that in 1245 there was a breach in the old circumstances, and an establishment of a new set essentially identical with the old; that, of course, if this identity be proved, the presumption under Section 4 will arise, but if it be not proved, that presumption cannot arise; that consequently the Judge's decision, which allows that presumption to arise from the simple fact of the payment of same rent for 20 years since 1245, is defective, and the case should be remitted with directions to him to enquire whether, as to the rate of rent on the jumma consolidated in 1245, the new arrangement is identical with the former or not, and to apply Section 4 or not as he may find the identity proved or not.

We think the contention of defendant is a valid one, and that the presumption, sanctioned by Section 4 of Act X of 1859, can only be legitimately employed in cases in which existing circumstances are stated to have been continued from the Decennial Settlement, and proof of such continuance for more than 20 years is given. In the present case, the existence of present circumstances dates from 1245, and it is asserted by defendant that present circumstances were only a re-arrangement of the prior ones, leaving the rate of rent to be paid by the parties untouched. The truth or otherwise of this assertion has not been enquired into by the Judge, and as on the truth or otherwise of it, the applicability or non-applicability of the presumption mentioned in Section 4 depends, we think that the Judge's decision in its present form is defective. We, therefore, remit the record to the Judge with directions that he will enquire into this point and pass whatever orders his finding on it may render necessary.

The 6th January 1865.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Puisne Judges.*

Ejectment (of Putneedar)—Jurisdiction of Revenue Courts (Avoidance of, by Zemindar).

Case No. 2173 of 1864 under Act X of 1859.

Special Appeal from a decision passed by Mr. C. S. Belli, Judge of Rajshahye, dated the 12th May 1864, affirming a decision passed by the Deputy Collector of that District, dated the 17th February 1864.

Thakoor Doss Mozoomdar and others (Defendants), *Appellants,*

versus

Radha Soonderee Dossee (Plaintiff), *Respondent.*

Baboos Debender Narain Bose and Romesh Chunder Mitter for Appellants.

Baboos Anund Gopal Paulit and *Kalee Kishen Sein* for Respondent.

Clause 6 Section 23 Act X of 1859 applies to the case of the illegal ejectment of a putneedar by the zemindar. The zemindar cannot divest himself of the jurisdiction of the Revenue Courts by merely refusing to take rent from the tenant or to acknowledge his rights.

THIS was a suit by a putneedar (special respondent before us) to recover possession of a village from which he had been ejected by the zemindar. It was brought under Clause 6 Section 23 of Act X of 1859.

It appears that the owner of the parent estate, one Kistodhun, died, leaving his widow Alekmonee power to adopt a son. She adopted the special appellant, Thakoor Doss Mozoomdar, and during his minority took possession of and managed the estate of her deceased husband. The putnee now in question was given by her during this period. After Thakoor Doss attained his majority, the entire zemindaree was sold in execution of a decree against the widow. The son sued to set aside this sale on the ground that Alekmonee had no right or interest in the estate, he being the adopted son of Kistodhun.

The sale was set aside accordingly, and Thakoor Dooss got possession, as against the purchaser, one Anundiram.

Directly he did so, he ejected the special respondent from the putnee granted to him by Alekmonee, and this suit is brought to recover.

Both lower Courts decided in favor of the plaintiff.

The points urged before us in special appeal are:—

1*st*. That the suit will not lie under Clause 6 Section 23 of Act X of 1859, inasmuch as that Section refers to illegal ejectment, whereas the present ejectment was by process of Court legal.

2*nd*. That the relationship of landlord and tenant did not exist between the parties, special appellant having neither recognized the putnee nor received rent from the special respondent.

3*rd*. That supposing the widow to have had the power of granting the putnee in question, this suit could not be tried under Act X; inasmuch as before the special respondent could recover, he would have to prove his title.

With regard to the first objection, we observe that as the special respondent's *bonâ fide* possession and grant of the putnee is admitted, the special appellant must show that he obtained under the Civil Court's order the power to dispossess the putneedar. Now the possession he acquired was the zemindaree right only, and this could not give him power to eject *proprio motu* tenants holding uder a *primâ facie* good title. The special respondent was confessedly in possession of a putnee holding for which he had a regular grant, and for which he had paid rent for a considerable period anterior to the special appellant's entry on the estate; and before he could be ousted, the zemindar would have to show that the putnee tenure was invalid, as his adoptive mother had no power to grant it. We observe further with reference to this putnee that the grant sets forth clearly and specifically the reasons which necessitated the alienation. They were the heavy debts of the estate for which actions had been brought, and to satisfy which, the very land granted in putnee had been attached and advertised for sale. The truth of these allegations is not denied by the special appellant; and that being the case, the widow, whether the putnee was granted during the time of her sole possession before the adoption of Thakoor Doss, or when she was guardian of and manager for her minor adopted son, would have by Hindoo law a right to make the alienation for the manifest benefit of the estate.

But, in any case, the putneedar could not be ousted, except on proof of the invalidity of his title, and his ejectment by the zemindar was in our opinion clearly illegal. Clause 6 Section 23 of Act X therefore applied so far.

The special appellant's second objection does not appear to us tenable. A zemindar cannot get rid of the jurisdiction of the Revenue Courts under Act X, by merely refusing to take rent from a tenant, or by declining to acknowledge that tenant's rights. The wording of Section 23 is perfectly clear. A suit for recovery of possession will lie against the party entitled to receive rent. Now it is admitted that the special appellant is the person entitled to receive rent from land comprehended in the putnee, and his mere declining to do so will not affect the special respondent's right to sue.

The special appellant's third objection has been disposed of in the foregoing remarks. There is no question as to the validity or otherwise of the putnee in the present suit. The special respondent was, as is everywhere admitted, in *bonâ fide* possession; he had paid rent to the *defacto* zemindar; he held the land under a grant. Before he could be legally dispossessed by the zemindar, the validity of the grant must have been successfully impugned, and the dispossession by the proprietor without such process was illegal, and the tenant is clearly entitled to recover possession.

We therefore dismiss the special appeal with costs.

The 6th January 1865.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Puisne Judges.*

Jurisdiction of Civil Court—Suit for ejectment by trespasser—Allegation of Mokurruree right by purchase.

Cases Nos. 1976 and 1994 of 1864.

Special Appeals from a decision passed by Baboo Grish Chunder Roy, Principal Sudder Ameen of the 24-Pergunnahs, dated the 26th April 1864, *reversing a decision of the Moonsiff of that District, dated the 13th January* 1864.

No. 1976.

Ram Chunder Mitter and others, (Plaintiffs), *Appellants,*

versus

Ramzanee Bebee and others, (Defendants), *Respondents.*

Baboos Doorga Doss Dutt and *Unnoda Persaud Mookerjee* for Appellants.

Mr. R. T. Allan for Respondents.

No. 1994

Gobind Chunder Mojoomdar (Defendant), *Appellant*,

versus

Bissumbhurree Dossee and others (Plaintiffs), *Respondents*.

Mr. R. T. Allan for Appellant.

Baboos Doorga Doss Dutt, Banee Madhub Banerjee, and *Debendro Narain Bose* for Respondents.

The Civil Court has jurisdiction in a suit for ejectment, in which the plaintiff expressly denies the existence of the relation of landlord and tenant, and treats the defendant as a trespasser.

When a ryot alleges a Mokururree right by purchase, the nature of his vendor's title ought to be enquired into, and whether it was or was not transferable.

THESE two special appeals refer to one and the same parcel of homestead land.

Plaintiff's case is that Luskuree, the husband of Ramzanee, and after him Ramzanee held this land; that her house having been burnt down, she, on the 7th of Aughraun 1266 B. S., resigned the land; and it thus passed into the possession of plaintiff, the putneedar; but that the defendants dispossessed plaintiffs by proceedings under Act IV of 1840.

Defendant also states that Ramzanee was the occupant, and that her house having been burnt down, and she being unable to rebuild it, sold the land to defendant in Pous 1266 B. S.

Ramzanee admitted the sale to this defendant.

On the first trial the case had been remanded for the investigation of the point whether the tenure of Ramzanee was of a transferable nature. The first Court has now held that the tenure was not proved to be transferable by the kubooleut of Luskuree of 1196 B. S., which was put in, and that no other satisfactory evidence of the fact was adduced. The first Court then dismissed plaintiff's case.

On appeal the lower Appellate Court found the allegation of the plaintiff that the land had been resigned by Ramzanee, was not proved; further, that the burden of proving that Ramzanee held a transferable tenure was on defendant alleging the purchase of *such* a tenure from her, and that as no pottah indicative of such a title was produced, the tenure was not a transferable one.

The lower Appellate Court added to the decretal order that if Ramzanee should not be found in possession, or, having held possession, should not pay the rent, then the plaintiff should hold such land as might be in his possession, and his right would be enforced under the provisions of Act X of 1859.

Both parties appeal from this decision.

In No. 1976, Ram Chunder Mitter, plaintiff, appeals against the addition to the decretal order by which Ramzanee Bebee is to have a possession for which she never asked. In No. 1994, Gobind Chunder Mojoomdar, defendant, appeals on the ground that there is no jurisdiction in the Civil Court, as this is a case not of trespass, but one where the relation of landlord and tenant is admitted by the vendor to defendant, *i. e.*, by Ramzanee, and the whole of plaintiff's case was put upon the istifa which the lower Appellate Court has found, as a fact, was not proved; lastly, that the plaintiff's alleged title thus failing, plaintiff's whole case must fail.

In this case we think it quite clear that the Civil Court has jurisdiction. The plaintiff, Ramchunder, sues to eject Gobind Chunder, expressly denying that the relation of landlord and tenant exists. Ramchunder's whole case is based on this, that he, by reason of Ramzanee having surrendered the land to him, is now alone entitled to possess it. He denies that Ramzanee transferred her rights to Gobind Chunder; and he denies that if she transferred them to him, she could do so in such a manner or under such a title as to bind him, Ramchunder. In short, he treats Gobind Chunder as a *trespasser*, and as having no right whatever to hold the lands in dispute. If Ramchunder fails to make out his own case, and to prove Gobind Chunder a trespasser, he is out of Court. The contention then being one of *title* and *not* one between *landlord* and *tenant*, such a suit is properly brought in a Civil Court.

Ramchunder Mitter is entitled to our judgment on his appeal from so much of the order of the lower Appellate Court as makes his obtaining possession be in any way dependant on Ramzanee's being in possession or paying rent.

Ramzanee has declared she has no longer any interest in the property, having sold her rights to Gobind Chunder. It is, therefore, impossible in this suit to give any decree, reversing the right of possession to Ramzanee, whatever may be the fate of the claim set up by Gobind Chunder.

As regards the validity of the transfer to Gobind Chunder, this does not seem to have

been originally one of the main issues in the case. It would seem rather, that Ramchunder rested his title more immediately on the surrender of her tenure by Ramzanee. That surrender, it is found by the lower Courts, never took place; and on that finding Ramchunder's suit might have been dismissed. But this was not the course taken. The surrender not being established, it was important to decide whether Ramzanee had any legal power to transfer her holding; and this accordingly has, without objection, been recorded formally as an issue, and tried in both the lower Courts. But the investigation of the lower Appellate Court is defective on this point, and the case must, therefore, be remanded for re-trial.

The defect consists in the statement which appears in the Court's judgment that inasmuch as Gobind Chunder claimed under an alleged *mokurreree* pottah transferred to him by Ramzanee, and as the pottah was not produced nor its non-production accounted for, and as there was "no other" evidence of the tenant having a mokurreree right, it must be held that there was no right to transfer. As a matter of fact, there *was other evidence* adduced to prove the *pottah, viz.,* a kubooleut said to have been granted by the husband of Ramzanee in 1196, and which, under certain circumstances, might have been admissible as evidence to prove Gobind Chunder's case. This kubooleut and some parol testimony the lower Appellate Court appears to have ignored, which is clearly wrong. It was treated by the Court of first instance as admissible in evidence, although that Court eventually declined to rely upon it and doubted its authenticity. The parties are entitled to have the decision of the Appellate Court on the genuineness and effect of the kubooleut, and may justly complain of its being overlooked and of a statement in the judgment that there was *no* evidence given of the mokurreree pottah.

Further, it appears to us that the lower Appellate Court has not fully disposed of the real matter in dispute. It has held that the mokurreree pottah alleged is not proved, but it does *not* give any substantive *finding* as to *what Ramzanee's tenure was.* It is stated that "as the tenants held "no other right than that of possession, the "purchase by Gobind Chunder could under "no circumstances be held valid." But a *right of occupancy* may be, and often is, a *transferable* right.* It was the duty of the lower Court to find distinctly what was the nature of Ramzanee's tenure, and then whether it was or was not transferable.

It was, moreover, necessary for the lower Appellate Court fully to investigate whether the deed of sale, alleged by defendant, represented a *bonâ fide* transaction. All that the lower Appellate Court records is this—"As "the vendor admits the purchase made by the "defendant, there is no necessity of seeing "the evidence of such purchase." Considering then that on these points there is a defect in law in the investigation of the case affecting the decision on the merits, we remand the case to be re-tried, with reference to these remarks, and we direct that it be at once taken up out of its turn as it is an old case.

*See Taramonee Dossee *vs.* Birresur Mozoomadar, Sutherland's Reports, page 86.

The 7th January 1865.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice,* and C. Steer, *Puisne Judge.*

Presumption of occupancy from Permanent Settlement—Rent claimable from a person not a ryot.

Case No. 2459 of 1864 under Act X of 1859.

Special Appeal from a decision passed by Mr. W. T. Tucker, Judge of Backergunge, dated the 7th June 1864, *reversing a decision of Moulvie Abdool Kurreem Khan Bahadoor, Deputy Collector of that District, dated the 27th January* 1864.

Petumber Shaha (Defendant), *Appellant,*

versus

Jebun Singh Burmonee (Plaintiff), *Respondent.*

Baboo Romesh Chunder Mitter for Appellant.

Baboo Hem Chunder Banerjee for Respondent.

A defendant, setting up a mouroosee pottah, which is found to be fictitious, cannot fall back upon the rights which he might have had under Section 4 of Act X of 1859.

Though the defendant may not be a ryot, the plaintiff is only entitled to claim from him a fair and equitable rent.

THIS is a suit for the rents of certain land consisting of one beegah and nine and half cottahs in the bazar of Sahebgunge, at an enhanced rate after service of notice under Section 13 of Act X of 1859.

The defendant pleaded a mouroosee pottah which the lower Court has found not genuine, and he also alleged that the rate demanded was excessive and greater than what is paid by neighbouring tenants, and that he, the

defendant, was not in possession of the quantity of land for which rent is demanded.

It is objected before us that the Judge ought to have taken into consideration the fact that defendant had held for 20 years at a fixed jumma, and that the presumption is that he had so held at that rate since the time of the Permanent Settlement, under Section 4 of Act X of 1859.

But the answer to this is, that the defendant, having set upon an alleged mouroosee pottah, which is found, apparently on good grounds, to be fictitious, cannot fall back upon the rights which he might have had under that Section.

As to the second point, the Judge has entirely failed to try the question, whether the rent claimed is a fair and equitable rate for the land in question.

The defendant appears not to be a ryot, and probably is not entitled to the privileges which have been conferred on ryots under Section 17.

But the plaintiff is only entitled to a reasonable rent, and the Judge must try what, under all the surrounding circumstances, is a fair and reasonable rate, and for this purpose the case is remanded.

The 7th January 1865.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Puisne Judges.*

Neem Ousut Talookdar—Howladar.

Case No. 2232 of 1864 under Act X of 1859.

Special Appeal from a decision passed by Mr. F. J. Cockburn, Judge of Backergunge, dated the 14th May 1864, reversing a decision of the Deputy Collector of that District, dated the 25th September 1863.

Bama Soonduree (Plaintiff), *Appellant,*

versus

Sheeb Soondurree Dabea and others, (Defendants), *Respondents.*

Baboo Grija Sunker Mozoomdar for Appellant.

Baboos Banee Nath Bose and *Nil Madhub Bose* for Respondents.

A neem ousut talookdar (whose tenure was created subsequent to the settlement with the ousut talookdar) cannot claim from a howladar holding under a pottah granted to him by Government, a higher rent than the rate fixed by Government as the maximum rate after a progressive jumma.

THE decision of the Lower Court is not a satisfactory one; but as we are able to dispose of the case without remanding it, we do so.

The plaintiff alleges that he is the neem ousut talookdar. He sues to enhance the rent of the holding of the defendant who is a howladar. There is no contention as to the area. The howladar holds under a pottah granted to him by Government who fixed the rate payable by the howladar at 8 annas, which was the maximum rate after a progressive jummabundee of 2 rupees, 4 annas, and 6 annas.

The Government concluded the settlement with the ousut talookdar, and the settlement was based on the jummabundee of the howladar. The only profit which was allowed to the superior holder was a surunjamee of 15 per cent. The plaintiff's tenure was not recognized at the settlement, and consequently no settlement was made with him.

It may be that, subsequent to the settlement, the neem ousut talook, a tenure intermediate between the ousut talook and the howlah has been created, but the rate payable by the howladar remains intact, *i. e.*, 8 annas per beegah. This rate the neem ousut talookdar is entitled to receive under the terms of the Government settlement. If the ousut talookdar swallows up all the profits in the shape of surunjamee, that is a question between him and the plaintiff, and in no way affects the howladar. The plaintiff's claim to enhance has been rightly dismissed. The appeal is dismissed with costs and interest.

The 9th January 1865.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Puisne Judges.*

Suit for kubooleut at enhanced rates (against farmers).

Case No. 2230 of 1864 under Act X of 1859.

Special Appeal from a decision passed by Mr. A. Abercrombie, Judge of Dacca, dated the 13th May 1864, affirming a decision passed by the Deputy Collector of that District, dated the 26th February 1864.

Sharoda Soondaree Chowdhrany and others, (Plaintiffs), *Appellants,*

versus

Mr. I. Tissendie and others, (Defendants), *Respondents.*

Mr. G. C. Paul and *Baboos Onoocool Chunder Mookerjee* and *Sreenath Doss* for Appellants.

Mr. R. V. Doyne and *Baboos Unnoda Pershad Banerjee* and *Kishen Dyal Roy* for Respondents.

A farmer is liable to give a kubooleut at enhanced rates when there is nothing in his pottah to show that his lease was taken for building purposes or that the zemindar's right of enhancement was restricted.

THIS is a suit to obtain a kubooleut for lands in the occupation of the defendants.

The Court of first instance ruled that as the practical purpose for which the lease was taken by the defendants was to build a factory, the precedent of the Court, dated the 9th September 1862, Maharajah Suttee Chunder Deb Bahadoor, appellant, applied; and that the plaintiffs were entitled to a kubooleut only at the rates hitherto paid by the defendants, *viz.*, 7 annas per pakee for a term of five years. A small portion of the land claimed by an intervenor was excluded from this order.

On appeal the Judge of Dacca confirmed the decision of the Deputy Collector, observing that as the land had been occupied as a factory for many years (60 or 70) and was not culturable land, the plaintiffs with reference to the ruling of the High Court of the 9th September 1862, could only claim a kubooleut at the rent hitherto paid.

In special appeal it is urged that the lease, under which the defendants held, is not such a lease as is contemplated in the decision of the High Court, quoted by the Court below; and that the Judge is wrong in law in disallowing the claim for a kubooleut at the prevailing rate of the Pergunnah, on the ground that the land is not used for cultivation. Further, that there is no stipulation in the pottah granted to the defendants, restricting the zemindar's right of enhancement.

We have carefully considered this case. The plaintiffs are the purchasers of the rights and interests of the Government in a certain khas mehal within which the tenure of the defendants is situated. They sue, alleging that as the lands in the tenancy of the defendants are bheetee lands, that is to say, wholly occupied by buildings, they tendered to them a pottah for a term of five years at the Pergunnah rate of 5 rupees a pakee, and demanded a corresponding kubooleut, that the defendants put them off with promises to give a kubooleut. Hence this suit for a kubooleut at the above rate and term; the jumma claimed being rupees 68.

Mr. I. Tissendie, one of the defendants, and the manager, and part proprietor of the factory, answers that the rate claimed is excessive—that it is unjust to claim such a high rate simply because a factory has been built on the lands—that, when the factory was built, the land occupied by it was of the same quality as other lands used for indigo purposes in the neighbourhood—that as the factory is of very long standing, it is unjust to demand a kubooleut for a term of five years.

The defendant, after alluding to the lease taken by his predecessor, Mr. T. Woodin, dated 2nd May 1860, states that he is willing to execute a kubooleut if the plaintiff will grant him a perpetual lease at a fair rate, and that moreover he had demanded a pottah on these terms, but the plaintiff refused to grant one.

It will be seen that the defendants do not set up a holding which is not liable to enhancement. Their lease dates from the 2nd of May 1860, and was granted to them by the Government, who were the proprietors of the parent khas mehal. We have read the pottah, dated the 2nd of May 1860, and find that it is a farming lease to Mr. Woodin for the term of one year. The lessee was prohibited from sub-letting or admitting a co-sharer without the consent of the Collector. There is nothing in this temporary lease to show that it was taken for building purposes. The precedent quoted by the Courts below is therefore wholly inapplicable. It appears to us that the lease, under which the defendants hold, does not even give them a right of occupancy, for there is nothing in the terms of the lease to show that it was in confirmation or renewal of former lease. It was, in our opinion, in the power of the plaintiffs to make their own conditions with the defendants, both in regard to the term of the lease and the rate of the rent. But they have waived whatever right they possessed to fix their own conditions, and have left it to the Court to do so. The proper rent must therefore be ascertained, and for this purpose the suit is remanded to the Lower Court. When the proper rate of rent is ascertained, and there appears to have been a local enquiry with that view, then the defendants will be called upon to execute and deliver a corresponding kubooleut. If the parties cannot agree as to the term of the lease, the Collector should fix it with reference to Section 76 Act X of 1859.

Costs to follow the result.

The 9th January 1865.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice* and the Hon'ble Shumbhoonath Pundit, *Judge.*

Jurisdiction—Suit for possession by tenant against adverse holders.

Case No. 2306 of 1864.

Special Appeal from a decision passed by Pundit, Tarakant Bidyashagur Roy Bahadoor, Principal Sudder Ameen of Jessore, dated the 21st May 1864, *reversing a decision passed by the Moonsiff of that District, dated the 11th September* 1863.

Ruttun Moonee Debea (Plaintiff), *Appellant,*

versus

Dhurmomoyee Dassee and others (Defendants and Intervenors), *Respondents.*

Baboos Prosono Coomar Bose and *Baney Madhub Banerjee* for Appellant.

Mr. C. Gregory for Respondents.

A suit for possession by an ejected tenant may be brought against a person whose title as adverse holder accrued before the institution of the suit, Clause 6 Section 23 Act X of 1859 not applying to such a case.

THIS is a suit by a tenant who has been ejected by Sheikh Kanoo and others, defendants, who claim under a lease from Dhurmomoyee Dassee, the zemindar; and Dhurmomoyee is also made a co-defendant.

The Plaintiff obtained a decree in the first Court. An intervenor, who claimed as purchaser under Sheikh Kanoo, appealed to the Principal Sudder Ameen who dismissed the suit on the ground that the suit was cognizable only by the Collector under Act X of 1859.

The plaintiff now appeals.

We are of opinion that, under the 6th Clause of Section 23 Act X of 1859, the plaintiff could not have recovered the possession of the lands as against Sheikh Kanoo, whose title as adverse holder had accrued prior to the institution of the suit. It is clear that he could not have instituted the present suit under Act X, and the Principal Sudder Ameen Judge was, therefore wrong in dismissing it. The case is accordingly remanded for trial on the merits.

The 9th January 1865.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice,* and the Hon'ble Shumbhoonath Pundit, *Judge.*

Suit for rent of land let for a Factory.

Case No. 2401 of 1864 under Act X of 1859.

Special Appeal from a decision passed by Mr. F. B. Simson, Judge of Jessore, dated the 10th June 1864, *reversing a decision of the Deputy Collector of that District, dated the 20th June* 1863.

Tarreney Persaud Ghose (Plaintiff), *Appellant,*

versus

Bengal Indigo Company (Defendants), *Respondents.*

Mr. A. F. Lingham for Appellant.

Mr. R. T. Allan for Respondents.

A suit lies under Act X of 1859 for the rent of land let for the purposes of a Factory including the dwelling house of the proprietor of the factory, it being immaterial for what purposes the lands were demised.

THIS was a suit for enhanced rent of certain land, 85 beegahs and some odd cottahs, which the plaintiff alleges to have increased in value without any assistance from the defendant, and owing to the increase in the value of the crops; and to be now held at a rate lower than that paid for neighbouring lands.

The defendant alleges that his predecessor Johannes Sarkies obtained a pottah of the lands from the zemindar in 1216, for the purposes of indigo operations at a fixed rent, and in pursuance of that privilege the factory was built.

The first Court on the ground that the defendant had paid a uniform rent for 20 years, dismissed the suit, at the same time finding the alleged pottah to be a forgery.

On appeal the Judge, without entering into the merits, dismissed the case on the ground that it should have been brought in the Civil Court.

Mr. Allan, for the defendant, in support of the decision of the lower Court, argued that the suit being for lands which are let for the purposes of an indigo factory including the dwelling house of the proprietor of

the factory, will not lie before the Collector under Clause 4 Section 23 of Act X of 1859. He refers to the case of Odditto Chunder Paul *versus* Kumlakant Paul (Marshall's Reports vol. 1 page 401) in which it was held that a suit for arrears of rent due on account of an indigo factory would not lie under Act X of 1859.

In that case, however, the rent was reserved, not for the *land*, but for the *factory* and the business and benefit of the contracts connected therewith. In Biprodoss Dey *versus* William Woollen ("Weekly Reporter" vol. 1 page 223) it was held that a suit could not be maintained under Act X of 1859 for the rent of a house and grounds.

In the present case, however, the rent issues out of, and was reserved in respect of, the land alone; and we think it was utterly immaterial for what purpose the lands were demised.

The case must, therefore, go back to the Judge for trial on its merits, and it is remanded accordingly.

The 9th January 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Appeal (by Deputy Collector).

Cases Nos. 136 and 137 of 1864 under Act X of 1859.

Miscellaneous Appeals from an order passed by the Deputy Collector of Jessore, dated the 29th December 1863, *reversing an order passed by the Deputy Collector of Koolnah, dated the 29th May* 1863.

Josim Kagzee, *Petitioner;*

versus

Kylash Nath Haldar, *Opposite party.*

Baboo Woomes Chunder Bose for Petitioner.

None for Opposite party.

Under Section 19 Act VI of 1862 B. C., one Deputy Collector may hear an appeal (if referred to him by the Collector) from the order of another Deputy Collector.

THE objection taken is, that this suit was disposed of by the Deputy Collector and appealed to the Collector; that the Collector, instead of trying the appeal himself, made it over to another Deputy Collector, who reversed the order passed by the first Court; and the petitioner contends that the Collector had no authority to make over the appeal as he has done, and consequently the decision of the Deputy Collector trying the appeal is without jurisdiction and must be annulled.

We think the provisions of Section 19 Act VI of 1862, Bengal Legislature, sufficiently meet this case, and provide for the hearing of an appeal by a Deputy Collector.

We reject the appeals with costs.

The 9th January 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Appeal (from order of Deputy Collector in execution of a decree).

Cases Nos. 501, 502, and 503 of 1864 under Act X of of 1859.

Miscellaneous Appeals from an order passed by the Judge of Tipperah, dated the 25th June 1864, *affirming an order passed by the Deputy Collector of that District, dated the 18th April* 1864.

Huro Chunder Burnum, *Petitioner,*

versus

Raj Kishen Roy, *Opposite party.*

Baboo Romesh Chunder Mitter for Petitioner.

Baboos Gopenauth Mookerjee and *Umbica Churn Banerjee* for Opposite party.

An appeal does not lie from the order of a Deputy Collector passed in execution of a decree under Act X of 1859.

THIS is an appeal from the order of a Deputy Collector passed in execution of a decree under Act X of 1859. The law allows of no appeal from such an order; and the decision of a full Bench, passed on the 16th March 1864, in the case of Rutton Monee Dossee, has distinctly ruled that an appeal from such an order cannot be heard. The appeals in these three cases are dismissed with costs.

The 10th January 1865.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice,* and Shumboonanth Pundit, *Judge.*

Jurisdiction (of Civil Court in suit for Kubooleut to try genuineness of pottah).

Case No. 2361 of 1864 under Act X of 1859

Special Appeal from a decision passed by Mr F. B. Simson, Judge of Jessore, dated the 27th May 1864, *reversing a decision passed by the Deputy Collector of Mugoorah, dated the 15th April* 1863.

Mr. F. C. Sandes (Plaintiff), *Appellant*,

versus

Surroop Chunder Biswas (Defendant), *Respondent.*

Mr. R. T. Allan and *Baboo Annund Chunder Ghosal* for Appellant.

Baboo Bhuggobutty Churn Ghose for Respondent.

Every Court, having jurisdiction over the subject matter of a suit, incidentally has jurisdiction (unless expressly barred by law) to try all pleas in bar urged in such suit. Consequently, the Revenue Courts under Act X of 1859 can try the genuineness in effect of a pottah pleaded in bar in a suit for a kubooleut at enchanced rent.

THIS is a suit under Act X for enchancement for rent, the plaintiff praying for a kubooleut. The defendant pleaded a mokurruree pottah, dated in 1242; the plaintiff answered that the pottah was invalid, and executed by a person not having power to grant it.

On appeal, the Judge refused to try the question, holding that the validity of the pottah was a matter to be determined by the Civil Court, and dismissed the plaintiff's suit.

The plaintiff appeals.

It is clear that the Collector's Court had jurisdiction over the suit. Every Court, having jurisdiction over the subject matter of a suit, must have, as an incident, jurisdiction to try all pleas in bar which may be pleaded in such suit, unless such jurisdiction has been expressly taken away by some positive law.

We, therefore, hold that the Judge was bound to try the question as to the genuineness and effect of the pottah.

Our opinion is an accordance with the cases of Huree Persaud Malee *versus* Koonjoo Behary Shaw, 1 Marshall 99, and Kallee Singh *versus* Mooteeram, 1 Sutherland's Weekly Reporter, 135.

The case must be remanded.

The 11th January 1865.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice* and Shumbhoonath Pundit, *Judge.*

Damages (for rent admitted by Defendant).

Case No. 2371 of 1864 under Act X of 1859.

Special Appeal from a decision passed by Mr. H. B. Lawford, Officiating Additional Judge of Jessore, dated the 2nd June 1864, *affirming a decision passed by the Deputy Collector of that District, dated the 2nd October* 1863.

Mr. John Beckwith (Defendant), *Appellant*,

versus

Moulvie Noorjumma and another (Plaintiffs), *Respondents.*

Mr. A. F. Lingham for Appellant.

None for Respondents.

Suit for rent and damages. Plaintiff's allegations as to the rate of rent having been disbelieved, and a decree given to him at the rates admitted by the defendant,—HELD that this was not a case in which damages were awardable under Section 2 Act VI of 1862, B. C.

THE only real ground of objection in this case is that damages have been improperly allowed. The plaintiff sued for rupees 2,054, on allegations as to the rate of rent, which were disbelieved by the lower Court. He recovered rupees 192, and rupees 24 as damages. The lower Court, in awarding that sum, adopted the rates admitted by the defendant.

Under these circumstances it is clear that the lower Court ought not to have allowed damages under the Bengal Act VI of 1862, Section 2. The lower Court does not find, nor can it fairly be inferred that defendant, without reasonable or probable cause neglected to pay the amount due from him. We, therefore, amend the decision of the lower Court by disallowing the rupees 24 awarded as damages. Indeed we are strongly disposed to think that no costs should have been allowed to the plaintiffs. No costs for this special appeal.

The 11th January 1865.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Jurisdiction (Suits to cancel lease for non-payment of rent or breach of condition).

Case No. 1925 of 1864.

Special Appeal from a decision passed by Sheik Ally Azin, Principal Sudder Ameen of Behar, dated the 29th April 1864, *reversing a decision passed by the*

Sudder Ameen of that District, dated the 7th August 1863.

Ranee Belsaree Coomaree (Plaintiff), *Appellant,*

versus

Soobrun Singh (Defendant), *Respondent.*

Messrs. G. Gregory and *C. Gregory* for Appellant.

Mr. R. E. Twidale for Respondent.

A suit to cancel a lease on account of breach of the conditions thereof, and for arrears of rent is within the exclusive jurisdiction of the Revenue Courts.

It appears that the defendant obtained a perpetual lease from the plaintiff with certain conditions, *viz.*, that non-payment of three instalments of rent should operate as an extinction of the lease. Plaintiff sued under Act X of 1859 for arrears of rent, and to cancel the lease on account of breach of the conditions thereof. He obtained a decree and might have proceeded under Section 78 of Act X in execution. But, on appeal, the Judge ruled that the provisions of Act X for the cancelment of a lease on account of non-payment of rent or breach of condition do not apply to a perpetual lease, but only to a ryotee tenure, wherefore he reversed the order for cancelment of the lease, leaving only the decree for arrears, and referring plaintiff to the Civil Court as regards his claim to cancel the lease and re-enter. Plaintiff has accordingly sued in the Civil Court, and got a decree from the first Court. Defendant appealed, and the Judge reversed the order on the ground that the plaintiff could only sell the tenure under Section 105 Act X of 1859. Plaintiff appeals specially. Without going further into the merits, we think that the order of the Judge in the Act X case was wrong, and that the Civil Courts have no jurisdiction in this case. The suit is not one to eject a person having no right of occupancy or to eject a tenant for a limited period after the determination of his tenancy, but is clearly a suit to cancel a lease on account of breach of the condition thereof, and comes under Clause 5 Section 23 of Act X of 1859. It is combined with a suit for arrears under Clause 4. It is therefore exactly the suit contemplated by Section 78; and the decree for ejectment would have been executed, if the arrears were not paid within fifteen days. Under the terms of Section 23, the Revenue Courts have exclusive jurisdiction, and the jurisdiction of the Civil Courts is barred. We must, therefore, dismiss this appeal on the ground that the Court had no jurisdiction in the case. At the same time, we express our opinion that this decision gives the strongest ground for applying within a reasonable time to the Judge for a review of his decision in appeal dated the 8th June 1861. Under all the circumstances we direct that each party shall pay their own costs in all Courts.

The 11th January 1865.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Enhancement (Improvements to land by both landlord and tenant).

Case No. 2251 of 1864 under Act X of 1859.

Special Appeal from a decision passed by Mr. F. L. Beaufort, Judge of the 24-Pergunnahs, dated the 28th May 1864, *affirming a decision passed by Moulvie Jainooddeen Hossin, Deputy Collector of that District, dated the 10th February* 1864.

Huro Pershad Roy Chowdhry (Plaintiff), *Appellant,*

versus

Wooma Tara Debia (Defendant), *Respondent.*

Baboos Annund Chunder Ghosal and *Banee Madhub Banerjee* for Appellant.

Mr. G. Gregory and *Baboos Onookool Chunder Mookerjee* and *Oprokash Chunder Mookerjee* for Respondent.

A landlord is not entitled to enhancement on the ground of improvement of the ryot's tenure by the making of a bund, when he has failed to prove that he erected the bund or that the increased value of the land is owing to the bund, and not to the ryot's own exertions in raising smaller embankments and keeping in repair sluice gates.

This was a suit to assess enhanced rent on a chuck in possession of the defendant (special respondent). The defence was that whatever increase of produce there might have been, was due to the ryot's own exertions. Both lower Courts decided that by the terms of the amulnamah granted to the proprietor by Government, the ryot's tenure was protected from enhancement.

This decision was appealed to the High Court, and the result was that the amulnamah was held not to protect the tenure. The case was remanded for enquiry into whether the increase of produce, if any, was caused otherwise than by the exertions of the ryot, and whether he held any, and what land in excess of the area covered by his pottah.

Both lower Courts have again decided in favor of the ryot on the first point of reference; on the second, rent was awarded at the old rates on an excess quantity of land found to be in special respondent's possession.

It is now urged in special appeal, that the produce has considerably increased, as is proved by the special respondent's own admissions, and that as this increase is the result of the improvements, &c., carried out by the proprietor, the land is clearly liable to pay enchanced rent.

These improvements are now stated by the special appellant to have been the bunding of the Mohamaya Khal, whereby the salt water was prevented from inundating special respondent's lands. On this point, the Judge held the evidence to be so vague and uncertain that it was impossible to fix accurately any specific act of improvement on the part of the landlord whereby the ryot's tenure had been benefitted; and as to the original making of the bund itself, he remarks that, without it, neither his own lands nor his ryot's would have been culturable at all. There was no evidence to show when or in what position the bund was made, whilst it was proved that the ryot had himself kept in repair sluice gates, dams, &c., and had erected other small bunds necessary for the cultivation of his holding.

Under these circumstances, we think that there is a sufficient finding of fact against the special appellant to prevent our interference. The building of the bund across the Khal is, the Judge states, dependent on the vaguest and most unsatisfactory testimony, whilst he considers the other evidence (local included) to prove that whatever increase the land many now produce is attributable not to the bund, so much as by the ryot's own erections and repairs.

As to what are called the special respondents admissions, we observe that it can be no ground for enchancement on the part of a proprietor, that his tenant in chief succeeds in getting a larger rent from his under-ryots, when the increased value of the land is attributable to that head tenant's exertions, and not to the assistance of the zemindar.

Had it been proved in this case that the erection of the Mohamaya bund by the special appellant was the special cause of any increased value of the special respondent's holding, of course the latter's suing his under-tenants for an enchanced rent would have been very good proof that the produce had increased; but here the proof fails *ab initio*. It is not positively shewn in the first place that the special appellant did erect the bund; nor in the second, that its erection would have increased the value of the special respondent's land, had it not been supplemented by the latter's own exertions in raising smaller embankments, and keeping in repair sluice gates.

Taking this view of the case, we dismiss the special appeal with costs.

The 12th January 1865.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Evidence (Canoongoe papers and proceedings of Settlement Officers).

Case No. 2262 of 1864 under Act X of 1859.

Special Appeal from a decision passed by Mr. C. Hobhouse, Judge of Midnapore, dated the 3rd June 1864, reversing a decision passed by Baboo Kedar Nath Deb, Deputy Collector of that District, dated the 14th March 1864.

Nund Duntpat (Defendant), *Appellant,*

versus

Tara Chund Pritheebaree (Plaintiff), *Respondent.*

Baboo Hem Chunder Banerjee for Appellant.

Baboo Mohendro Lall Shome Respondent.

Canoongoe papers and proceedings of settlement Officers are good evidence in questions of pergunnah rates, standards of measurement, and the like.

THIS was a suit for a kubooleut at an enhanced rate of rent after service of notice. The ryot objected to the standard of measurement assumed by the plaintiff, as also to the rates as excessive.

The issues laid down were:—

1*st.* What is the standard of measurement?

2*nd.* What are the prevailing rates?

The Court of first instance found that the pergunnah measurement rod was one of 8 feet 2½ inches. The rates were fixed as stated by the defendant.

On appeal, the Judge reversed this decision, and held that the pergunnah measurement rod was one of 6 feet 9 inches, and that the rates were as alleged by the plaintiff.

In special appeal it is urged:—

1*st.* That the Judge was wrong in rejecting the evidence furnished by the Canoon-

goe papers and the settlement proceedings of the Government officers, and further that the *onus* of proving that the standard of measurement was 6 feet 9 inches was on the plaintiff.

2nd. That the rates have not been properly fixed.

The Judge observes of the Canoongoe papers, that they are not attested, and that they prove too much, for while they state that the rod of measurement is 4½ hâts in length, they convert this standard into 8 feet 2½ inches, whereas the proper calculation is 6 feet 6 inches.

With reference to the settlement proceedings, the Judge remarks that the Government, in making their settlements, fixed the standard pole at 8 feet 2½ inches, but that this act of the Government was done in their capacity of zemindar, and that such act is not binding on any other zemindar.

We think that the Judge was wrong in setting aside the Canoongoe papers. These papers were submitted in original to the Court of first instance by the record-keeper of the Collectorate. They come from proper custody, and are certainly of great weight in questions connected with pergunnah rates, standards of measurement, and other such like statistics. They were compiled by parties representing the zemindaree interest well cognizant of such matters, and who could have had no possible interest in representing that the rod was a larger one than it really was, and, therefore, all in favor of the ryot. The Judge appears to set aside these documents, mainly because 4½ hâts reduced to English measurement on a calculation of 18 inches to the hât are not equal to 8 feet 2½ inches, forgetting that it is notorious that the hât varies in length in many pergunnahs. The Canoongoe papers give the native standard of measurement prevailing in the pergunnah in dispute with the equivalent in English measurement *viz.*, 8 feet 2½ inches.

The settlement proceedings are also good evidence on this point. The settlement Officer, being doubtful as to what was the pergunnah rod, referred the question to the Collector who is an authority on this subject. He decided on refrence to his recordss that the rod was ene of 8 feet 2½ inches. The Government may have been acting in this instance in its capacity of zemindar; but we fail to see why Government should measure with a rod so favorable to the ryot, unless satisfied that that rod was the standard of measurement of the pergunnah. We, therefore, reverse the decision of the Judge in the matter of the rod, and restore that of the Court of first instance.

With reference to the second point, as the Judge after due enquiry has fixed the rate, we cannot interfere in special appeal.

The judgment of the lower Appellate Court is modified with costs in proportion payable by the respondents.

The 12th January 1865.

Present:

The Hon'ble C. Steer and E. Jackson, *Judges.*

Enhancement—Old rent.

Case No. 2254 of 1864 under Act X of 1859.

Special Appeals from a decision of Mr. F. S. Pearson, Judge of Tirhoot, dated the 16th May 1864, *reversing a decision of Mr. G. Graham, Assistant Collector of that District, dated the 30th Spetember* 1863.

Chunder Narin Chowdhry (Plaintiff), *Appellant,*

versus

Kassee Khan (Defendant), *Respondent.*

Case No 2255 of 1864 under Act X of 1859.

Chunder Narain Chowdhry (Plaintiff), *Appellant,*

versus

Dhurum Dutt Khan (Defendant), *Respondent.*

Baboo Kallee Kishen Sein for Appellant.

Baboo Kallee Prosono Dutt for Respondent.

Though a landlord may fail in establishing his claim to enhanced rent, he is nevertheless entitled to a decree for the old rent, if it has not already been paid.

THESE are suits for arrears of rent for 1270 at enhanced rates.

The Judge held that the notice was not served in due time and dismissed the suit.

In special appeal it is urged that the Judge ought not to have dismissed the suit entirely, because the plaintiff had failed to prove that he was entitled to the higher rent claimed; but that he should have decreed to the plaintiff payment at the admitted old rate of rent.

We think that, as the suit was one for arrears of rent, the plaintiff was entitled to a decree for such sum as he was able to prove; and he could not prove that he was entitled to the enhanced rent claimed, because

the notice was not served in time; but he was entitled to the old rent as admitted by the defendant, if that amount did not appear to have been paid. Whether the rent for 1270 has been paid at the old rate, the Judge has not enquired; and the papers submitted to this Court do not enable us to determine that matter of fact. We have no other course then, than to remand the case to the Judge, who, if he finds that the rent for 1270 has not been paid at the rate admitted by the defendant, will give the plaintiff a decree; and if he finds that they have been paid, he will dismiss the suit. The costs of this special appeal will be given for or against the parties as the Judge may consider equitable with reference to what may be his utlimate decision.

The 12th January 1865.

Present:

The Hon'ble C. Steer and E. Jackson, *Judges.*

Payment to one joint-proprietor.

Case No. 880 of 1862 under Act X of 1859.

Special Appeal from a decision passed by the Judge of Sarun, dated the 25th February 1862, *reversing a decision passed by Mr. Macpherson, Officiating Collector of that District, dated the 21st June* 1861.

Baboo Oodit Narain Singh and others (Plaintiffs) *Appellants,*

versus

Mr. H. Hudson and others (Defendants), *Respondents.*

Moulvie Syud Murhamut Hossein for Appellants.

None for Respondents.

Payment to one of several-joint proprietors is a payment to all.

IN this suit, the Judge finds that three persons were joint-proprietors; and that, defendant having paid his rents to one of the joint-proprietors, that is a payment to all, and the defendant is discharged. This is quite a proper view of the defendant's liability, and we dismiss the special appeal.

The 12th January 1865.

Present:

The Hon'ble C. Steer and G. Campbell, *Judges.*

Fraudulent Decree—Re-hearing (at the instance of judgment-debtor).

Case No. 1971 of 1864 under Act X of 1859.

Special Appeal from a decision passed by Mr. W. T. Tucker, Judge of Backergunge, dated the 23rd June 1864, *affirming a decision passed by the Deputy Collector of that District, dated the 15th February* 1864.

Boidoo Nauth Roy and others (Plaintiffs), *Appellants,*

versus

Brojo Kissore Chuckerbutty and others (Defendants) *Respondents.*

Baboos Greeja Sunker Mojoomdar and *Issur Chunder Chuckerbutty* for Appellants.

Baboos Kali Mohun Doss and *Hem Chunder Banerjee* for Respondents.

When a decree is obtained fraudulently and without notice to the opposite party either of the suit or sale, the judgment-debtor may claim a re-hearing any time within 15 days after the seizure of his person or property.

AN *ex-parte* decree was passed against defendants, and a sale of a tenure was carried out under that decree. Subsequently, the defendants represented that the whole case was fraudulent, and that they had no notice either of the suit or of the sale. Inquiry was made. The facts were proved to be as alleged by defendants; and by an order of review, the first order wasset aside. Plaintiff, appellant, contends that defendants were bound to come within 15 days (under Section 58 Act X of 1859), and that as more than that period had passed they could no longer be heard. But, as the facts are found, we are clear that, independent of the question of an ordinary review, defendants could claim a re-hearing any time within 15 days after such steps in execution as must necessarily bring the decree to their notice, *e. g.*, the seizure of their person or property; and that the re-hearing was properly granted.

We dismiss the appeal with costs.

The 12th January 1865.

Present:

The Hon'ble C. Steer and G. Campbell, *Judges.*

Jurisdiction (Suit to cancel lease).

Case No. 2023 of 1864.

Special Appeal from a decision passed by Mr. R. Thompson, Judge of Nuddea,

dated the 18th April 1864, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 24th July 1863.

Ram Chunder Dutt and others (Plaintiffs), *Appellants,*

versus

Din Doyal Poramanic (Defendant), *Respondent.*

Baboos Opendro Chunder Bose and *Poorno Coomar Sein* for Appellants.

Baboos Romanauth Bose and *Baney Madhub Bose* for Respondent.

Every suit to cancel a lease on account of a breach of any conditions thereof must be brought before the Collector under Clause 5 Section 23 Act X of 1859.

THIS is a suit to cancel a dur-putnee lease on account of breach of the conditions thereof. The alleged breach is non-payment of rent on occurrence of which a right of re-entry was stipulated. We think that the Civil Courts have no jurisdiction in this case, inasmuch as it clearly falls within the terms of Clause 5 Section 23 of Act X of 1859, by which an exclusive jurisdiction is given to the Revenue Courts. It is argued that the above provision does not apply to perpetual leases, but nothing is shown to us to support that argument either in the words of the law, or in any case decided on the point.

The law uses the word "lease" without any limitation whatever, and we have no doubt that it includes all leases, whether from year to year, for a term, or perpetual. Every suit to cancel any lease on account of any breach of any conditions thereof must be brought before the Collector, who, if the case is made out, can give a decree of ejectment or otherwise. That decree will, of course, in execution, be subject to the provisions of the law; but as the Civil Courts have no jurisdiction under the law, we need not go further, and decree the appeal with costs.

The 14th January 1865.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Section 25 Act X of 1859—Ejectment (by Zemindar)—Naib (Authority of)—Appeal.

Case No. 2156 of 1864 under Act X of 1859.

Special Appeal from a decision passed by Mr. P. Taylor, Judge of East Burdwan, dated the 22nd February 1864, affirming a decision passed by Baboo Ubhoy Churn Bose, Deputy Collector of that District, dated the 16th June 1863.

Joy Kishen Mookerjee (Plaintiff), *Appellant,*

versus

Ramdhun Roy and another (Defendants), *Respondents.*

Baboos Pearee Mohun Mookerjee and Banee Madhub Banerjee for Appellant.

Baboos Onookool Chunder Mookerjee for Respondents.

Section 25 Act X of 1859 is not applicable to a case in which the plaintiff admits that the defendant has a pottah, but questions the authority of the naib who granted it. The appeal in such a case lies to the Judge and not to the Commissioner.

WE think that the appeal in this case was cognizable by the Judge, and that the lower Appellate Court was wrong in holding that the appeal lay only to the Commissioner.

The suit is for possession of lands, which the defendant claims to hold under a pottah granted by the naib of the plaintiff. The plaintiff repudiates the pottah, on the ground that the naib had no authority to grant it. That being so, the material issue is as to the authority of the naib, the question being whether he had authority to grant a pottah so as to bind the plaintiff. That is much more a judicial than an executive question, and may, we think, be disposed of in appeal by the Judge, as we do not consider that Section 25 of Act X of 1859 is applicable to a case of this nature, where it is admitted that the defendant has, in fact, got a pottah, and the only dispute is as to the authority of the naib who granted it.

The case must be remanded for trial on the merits, with reference to the decisions of this Court as to the authority of naibs to grant pottahs.

The 16th January 1865.

Present:

The Hon'ble C. Steer and E. Jackson, *Judges.*

Suit for rent (on Kubooleut not proved).

Case No. 1446 of 1864 under Act X of 1859.

Special Appeal from a decision passed by Mr. F. L. Beaufort, Judge of the 24-Pergunnahs, dated the 9th March 1864, affirming a decision passed by the Deputy Col-

lector of Bashirhath, dated the 12th Januury 1864.

Sheik Abdoolla (Defendant), *Appellant*,

versus

Nim Chand Dutt and others (Plaintiffs), *Respondents.*

Baboos Nil Madhub Sein and *Bhuggobutty Churn Ghose* for Appellant.

Baboo Kedarnath Mozoomdar for Respondents.

Suit for rent on a kubooleut. The kubooleut not having been proved, the lower Court might have dismissed the suit.

Whether the High Court should interfere with the discretion of the lower Court in decreeing the claim to the extent admitted by the defendant.—*Quære.*

THIS was a suit for arrears of rent founded on a kubooleut. Both Courts have held that the kubooleut, which was an agreement for enhanced rent has not been proved, and have decreed the claim only at the rate admitted by the tenants.

On special appeal it is said that, as the kubooleut was not proved, the case should have been dismissed. We think that the lower Court might, under the precedents of this Court, have dismissed the plaintiff's suit under the circumstances; but it is a question whether this Court should interfere with the discretion which the lower Court has exercised in decreeing the claim for rent as far as the defendant admits he is in arrear. It is not distinctly declared that the kubooleut is a forgery. But there seem to be reasons to suspect it, and the proof adduced in support of it is not considered sufficient.

On the whole, the Judge thought proper to decree at the admitted rate. We will not at this stage interfere in that decree.

It is then said that the plaintiff is not the proper party to receive the rents but a third party. We observe that this third party intervened, but his claim was rejected in the beginning under Section 77 of the Act. He has not appealed, but has gone to the Civil Court; the tenant cannot carry on the third party's case.

Appeal dismissed with costs.

The 16th January, 1865.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Presumption of occupancy from Permanent Settlement—Diminution of jumma caused by alienation of part of jote.

Case No. 2336 of 1864 under Act X of 1859.

Special Appeal from a decision passed by Mr. A. Pigou, Judge of Hooghly, dated the 31st May 1864, *reversing a decision passed by the Deputy Collector of that District, dated the 30th September* 1863.

Kenaram Mullick (Defendant), *Appellant*,

versus

Ramcoomar Mookerjee (Plaintiff), *Respondent.*

Baboos Kalee Kissen Sein and *Toolsey Doss Seal* for Appellant.

Baboo Nobo Kissen Mookerjee for Respondent.

A diminution in the jumma, caused by the alienation of a portion of his jote does not deprive a ryot of the benefit of the presumption under Section 4 Act X of 1859.

THIS was a suit on the part of the special respondent to recover enhanced rent on his tenant's (the special appellant's) holding after notice.

The defence was that the land had been held for generations at an uniform rent, and that the ryot was therefore entitled to the benefit of the presumption given by Section 4 of Act X of 1859.

The Moonsiff, although he considered the tenure liable to enhancement, inasmuch as the defendant admitted that the jumma was fixed in 1247 B. S., refused to allow the plaintiff's claim on the ground that the value of the land had not been increased by other agency than that of the ryot.

The Judge held the ryot liable, and fixed the rent at an enhanced rate.

It is urged, in special appeal, that the Judge has proceeded altogether upon a misconception; and that there is nothing on the record to show that the rent was fixed in 1247 B. S. only.

This objection must, we think, be allowed.

The Judge appears to have altogether ignored the ryot's statement, which was, not that the jumma was fixed in 1247 B. S., but that in that year he parted with a portion of his jote (8*b*-14*c*. 2*ch*.) and that the diminished rent payable was so much, *viz.*, Rupees 20-6-11. Under such circumstances the rent would of course appear to vary from what it was in former years, but in reality it would be the same. The defendant never admitted that his rent was fixed in 1247 B. S., but stated that in that year he paid a certain rent, whereas for former years he had paid a considerably

larger one, the difference being caused by his having alienated a portion of his jote.

As the lower Appellate Court's judgment was founded on this palpable mistake, the case must go back for the Judge to find on the ryot's claim to the presumption under Section 4 of Act X. Had there been sufficient evidence on the record, we should have decided the point ourselves, but there are no dakhilas filed in the case earlier than 1247; and the case or cases (for there appear to be several in which these parties are concerned) in which they are said to be filed, are not before us.

The Judge will, therefore, take into consideration the ryot's plea that the difference in his Jumma from the year 1247 was caused by his diminishing his jote; if that be shown, and it be likewise shown that these differences can be reconciled, and that from before 1247 his rent has been virtually unvaried, he will, we think, be clearly entitled to the presumption claimed.

Costs to follow the result.

The 14th January 1865.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Julkurs—Right of occupancy—Applicability of Act X of 1859.

Case No. 2363 of 1864.

Special Appeal from a decision passed by Mr. James Reily, Principal Sudder Ameen of Dinagepore, dated the 25th May 1864, *reversing a decision passed by the Moonsiff of that District, dated the 18th January* 1864.

Woomakant Sircar (Defendant), *Appellant,*

versus

Gopal Singh (Plaintiff), *Respondent.*

Baboos Prosunno Coomar Sein and *Roop Chunder Sein* for Appellant.

None for Respondent.

Mere occupancy of a julkur for a series of years by a tenant at will, can give him no preferential right against his landlord's lessee. Act X of 1859 is not applicable to such a case.

THIS was a suit to recover possession of a certain julkur, the plaintiff (special respondent) alleging that he got a lease of the fishery from the zemindar on the death of the former tenant, Kaleekant, in 1269 B. S., and held it until the defendant illegally caught and appropriated the fish, and so ousted plaintiff from possession.

The defence was possession from the time of the special appellant's great grand-father at a yearly rent of 1 rupee 11 annas 4 gundas.

The Moonsiff considered that the defendant had been in possession of the julkur for a long time, and was, therefore, under Section 6 Act X of 1859, entitled to retain possession so long as he paid a fair rent. He held further, that there was no proof of the defendant having neglected or declined to payment, and, therefore, dismissed the plaintiff's suit.

On appeal, the Principal Sudder Ameen, after remarking that the provisions of Act X did not apply to the case, tried the issues—Did the zemindar give a lease to the plaintiff, and had he the right to do so? The first he found as an undisputed fact, and on the second, decided that the defendant was a mere tenant at will, and could be ousted at any time at the pleasure of his landlord.

The special appellant's pleader abandons all his objections, save one, namely, that the question to be determined was, whether the special appellant had any hereditary right to hold the julkur, and that not having been decided, the Principal Sudder Ameen's judgment was incomplete.

We see no reason to interfere. The special appellant holds no lease from the zemindar, and his mere occupancy of the julkur for a series of years will give him no preferential right against his landlord's nominee. Even admitting that he was not served with notice (a fact which the Court of first instance admits inferentially to be proved) the special appellant would not, we think, be in a position to contest his zemindar's determination to lease out the fishery to another. Special appellant was a mere tenant at will, and could be ousted at any time by the proprietor of the julkur. The Moonsiff was wrong in applying the provisions of Act X to the present case.

The special appeal is, therefore, dismissed with costs.

The 17th January 1865.

Present :

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges*

Khas Khareedah Mehal—Ejectment (by Zemindars)—Trespassers.

Case No. 2157 of 1864 under Act X of 1859.

Special Appeal from a decision passed by Mr. F. L. Beaufort, Officiating Judge of the 24-Pergunnahs, dated the 8th March 1864, *affirming a decision of the Deputy Collector of that District, dated the 16th October* 1863.

Hurro Mohun Mookerjee (Defendant), *Appellant,*

versus

Chintamonee Roy (Plaintiff), *Respondent.*

Baboos Mohendrololl Shome, Tamucknauth Sein, and *Peary Mohun Mookerjee* for Appellant.

Baboo Anund Chunder Ghosal for Respondent.

In a Government *khas khareedah mehal*, Government stands in the position of an ordinary zemindar; and therefore the registration of a transferable tenure is as necessary in the serishta of Government as zemindar, as in the seristha of any other zemindar. Where a tenure is not transferable, and the transfer has not been consented to or adopted by the zemindar, the zemindar is entitled to treat the ryot as a trespasser, and to evict him even in the middle of the year.

But where a tenure is transferable, the mere absence of registration or of acknowledgment of the zemindar's right by the ryot will not make the ryot such a trespasser as to justify the zemindar in evicting him in the middle of the year.

Mr. Justice Bayley.—In this case plaintiff sues for the possession of certain land on the allegation that defendant illegally ousted him on the 15th Assin 1269. Plaintiff alleges that the cause of defendant ousting him was, that plaintiff refused to pay enhanced rates unjustly demanded from him. Plaintiff bases his claim:—

1*st.* For a portion by purchase of a jote jumma from Goluck Holdar.

2*nd.* For another portion by lease from one Doorgapersad Chowdhree, a farmer.

Defendant's case was that for part of the land in suit, one Madhub Boroye was the tenant, and that defendant obtained a decree for the arrears of rent of that land against Madhub Boroye; and that for the rest, Goluck Holdar was still the tenant, plaintiff having no connection whatever with the land of which he now sued for possession.

The first Court (the Deputy Collector) held that the land was in plaintiff's possession, and that defendant had ousted plaintiff from it. Further, that although Goluck Holdar had deposed that he had mortgaged the land to plaintiff, and then redeemed the mortgage, this was false.

The first Court on these grounds decreed possession to plaintiff.

Defendant appealed to the Judge, and pleaded that the alleged transfer of plaintiff was not valid, because it was not registered in the zemindar's serishta; also that the suit was barred by limitation. Defendant also denied the fact of plaintiff's possession.

The Judge, upon these pleas, records that the "defendant pleads limitation, but it is not "supported by evidence." The Judge, then finds "on the evidence that plaintiff was "in possession, and that the defendant was "not legally justified in ignoring the transfer "of Goluck Holdar to the plaintiff." He then adds "that the question of perma-"nency of the tenure can be determined in "another suit." He also finds as a fact that the "plaintiff has been dispossessed illegally "in the middle of the year, and that the de-"fendant must proceed to evict by process of "law if he desire to obtain possession of the "land." The Judge, accordingly, dismissed defendant's appeal.

The pleas taken in special appeal by defendant are:—

1*st.* The auction-purchaser is not bound to recognize a transfer not registered in the zemindar's serishta, and, therefore, plaintiff has no right to sue.

2*nd.* That the portion of the land (4 beegahs 3 cottahs) given by the farmer to plaintiff, cannot remain in plaintiff's possession after the expiry of the farmer's lease.

3*rd.* That limitation bars the suit.

4*th.* That illegal dispossession, even if proved, does not entitle a plaintiff to a decree to be restored to possession, but only to damages.

Judgment.—It is admitted before us that the lands lie in a Government Khas Khareedah Mehal, purchased at auction by defendant; and that plaintiff has not registered his alleged transfer in the zemindar's serishta

On the first plea, I am of opinion that the zemindars consent to transfer, either by registration or admission by receipt of rent, is necessary as the general rule; and as much so when Government is zemindar as when others may be, for Government has, as zemindar, the position of any ordinary zemindar. The first question, however, in this case is one not decided at all by the lower Appellate Court, *viz.*,—Is the tenure a transferable one or not? For, if not, plaintiff is a trespasser merely; but if it be transferable, then the plaintiff could, in my opinion, under Clause 6 Section 23 Act X of 1859, sue for possession as he has done. Further, if he prove the tenure to be transferable, he certainly could not be ousted in the middle of the year, and it is found as a fact below that he has been so. In this case I think a decree for possession would be right.

There remains the question as to the other portion, which plaintiff says he took from the farmer. I do not think that plaintiff could be legally ousted from that till the expiry of the farmers' lease, and it is found as a fact that he has been so. I think therefore a decree for possession of this portion would be right.

It is indeed pleaded that, as the period of the farmer's lease would have expired before such a decree could become operative, and as plaintiff could not hold after the expiry

of the lease of the farmer who gave him his tenure, it would, as to this part of the land, be no use giving such a decree. Whether it might be of use or not, is not the question; but whether plaintiff is entitled to it or not: and, if entitled, plaintiff should at least have a decree declaratory of a title to possession for the portion which he held from the farmer for the period of the farmer's lease. Plaintiff might then act, as he might be advised, as to going into Court with such decree for such damages as he may have sustained. It may be observed that in this suit his prayer is for possession, not for damages.

In respect to the lands alleged by plaintiff to have been purchased from Goluck Holdar, I would remand the case for the trial of the point whether it is a transferable tenure or not. If it be not, I think the defendant's act of ejectment, even in the middle of a year, right, as the plaintiff was a mere trespasser. If, however, the tenure be found to be a transferable tenure, then the question arises whether absence of registration in the zemindar's serishta, makes the occupation of plaintiff illegal, and constitutes him simply a trespasser.

On this point I would hold that such omission only would not make plaintiff, holding a transferable tenure, such a trespasser as would justify defendant in evicting him in the middle of the year. And I would decree to him possession subject to eviction at the end of the year under legal process.

I would remand the case for re-trial with reference to the above remarks.

Mr. Justice Macpherson.—I concur in thinking that this case should be remanded for re-trial. As regards the land purchased from Goluck Holdar, the decision of this Court in the case of Horo Mohun Mookerjee *vs.* Ramcoomar Mitter * is in point. The question for the lower Court to decide was whether the rights of the original tenant, Goluck Holdar, were legally transferable, and whether, under the circumstances, the defendant could be compelled to recognize, and be bound by the transfer to the plaintiff. If the tenure be not a transferable tenure, and the transfer has not been consented to or adopted by the defendant or those through whom he claims, I think that the defendant was entitled to treat the plaintiff as a trespasser, and to evict him even in the middle of the year. If, on the other hand, the tenure be transferable, the mere absence of registration or of any acknowledgment of plaintiff's right by the defendant, would not of itself justify the defendant in evicting him as he has done, and in the latter event, the plaintiff should be restored to possession, it being open to defendant to institute such legal proceedings as he may be advised for the purpose of ejecting him.

* Sutherland's Reports, page 225.

As regards the lands held under the izaradar, I think the ouster during the term of the izara was illegal, and that the plaintiff is entitled to a declaration of his right to possession till the izara expires. Of course, if the izara expired prior to that declaration being made by the Court, no actual possession could be given under it; but the declaration might be made the basis of a suit subsequently brought by the plaintiff for damages.

I do not see how any question of limitation arises; but the objection taken in the memorandum of appeal, as to limitation, was not pressed in argument,—nor was the fourth objection.

The 18th January 1865.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble C. B. Trevor, G. Loch, Shumboonauth Pundit, and E. P. Levinge, *Judges.*

Limitation (Suits for rent).

Case No. 294 of 1863 under Act X of 1859.

Regular Appeal from a decision passed by Baboo Cally Churn Ghose, Deputy Collector of Chowkee Meherpore, Zillah Nuddea, dated the 6th May 1863.

Mr. John Poulson and another (Defendants), *Appellants,*

versus

Modhoosoodun Paul Chowdhry (Plaintiff), *Respondent.*

Messrs. R. T. Allan and *R. E. Twidale* for Appellants.

Baboo Mohendro Loll Shome for Respondent.

Suits for arrears of rent under Act X of 1859 are not affected by Act XIV of 1859.

The Chief Justice.—THIS was a suit instituted on the 16th April 1863 (29th Cheyt 1269) for the rents of certain land of the years 1265 to 1269. The Deputy

* This case was heard on the 26th July 1864, when the conclusion arrived at by the Court was orally stated.

Collector, on the ground that the plaintiff had been engaged in prosecuting another suit on the same cause of action against the defendant, applying the provisions of Section 14 Act XIV of 1859, decreed to the plaintiff the rents of 1265. Mr. Justice Kemp and Mr. Justice Campbell referred the case to a full Bench to decide whether Act XIV of 1859 applied to suits brought under Act X of 1859.

The Preamble of Act XIV of 1859 ("An Act to provide for the limitation of suits,") states, that "it is expedient to amend and consolidate the laws relating to the limitation of suits," and for that purpose it enacted that "no suit shall be maintained in any Court of Judicature within any part of the British Territories in India in which this Act shall be in force, unless the same is instituted *within the period of limitation hereinafter made applicable to a suit of that nature*, any Law or Regulation to the contrary notwithstanding; and the periods of limitation and *the suits to which the same respectively shall be applicable* shall be the following." Then comes the enumeration amongst which, in Clause 8 Section 1, is "suits for the rents of any *buildings or lands* (other than summary suits before the Revenue Authorities under Regulation V of 1822 of the Madras Code), the period of three years from the time the cause of action arose." The question is, whether, under the description of "suits for rents of buildings or land," suits for arrears of rents under Act X are meant to be included.

The argument on behalf of the respondent is that Act XIV is the general law of limitation, and that the intent of the Legislature was that the period of limitation in all suits to be instituted after that Act came into operation should be regulated by it. Clauses 1 to 15 of Section 1 enumerate a great number of different suits to which different periods of limitation are respectively to be applicable, and Clause 16 provides a period of limitation for all suits to which no other limitation is thereby expressly provided. At first sight, therefore, it might appear that the Act is meant to be applied to all suits of whatever nature or kind. But in Section 18 it is enacted that all suits, *to which the provisions of this Act are applicable*, that shall be instituted after the expiration of two years from the date of the passing of this Act, shall be governed by this Act and by no other law of limitation, any Statute, Act, or Regulation now in force notwithstanding." The Act then is not universal in its application. It is clear that the Legislature contemplated that there were *some* suits to which the provisions of the Act would not be applicable. It can hardly be said that the Act is not applicable to cases where shorter periods of limitation than those prescribed in Section 1 are kept alive by Section 3, because *first*, the Act does apply to them in keeping alive such shorter limitation, and *secondly*, in every other respect except the period of limitation, they are probably meant to be regulated by Act XIV.

Act X of 1859 received the sanction of the Governor-General only six days previously to the passing of Act XIV. Now it is a sound rule of construction that "the "law does not favor a repeal by implication, "unless the repugnance be quite plain; and "such repeal carrying with it a reflection "on the wisdom of former Parliaments, it has "ever been confined to repealing as little as "possible of the preceding Statute. Although "these two Acts of Parliament are seemingly "repugnant, yet if there be no Clause of "*non-obstante* in the latter, they shall, if "possible, have such construction that the "latter may not be a repeal of the former "by implication." Dwarries on Statutes, 533.

If the words "suits for the rents of any building or lands" have been intended to include suits dealt with by Section 32 of Act X, we should have been obliged to say that the Legislature, by Section 32, created a limitation of three years from the end of the Bengal year or month of Jeyt of the Fussily of Willaity year to remain in force for two years; but after that period, when the limitation in Act X had become thoroughly well known and understood by the Agricultural Community, without any particular reason for the change, they would find that suits must be brought within 3 years of the cause of action, if for arrears of rent on account of land—or six years if on account of pasturage, forest rights, fisheries, &c.,—with privileges as to the extension of the period in the latter case which it was not thought necessary to provide for in the former. It would be difficult to assign any just reason why in Acts of the Legislature which were under consideration at the same time, applicable to the same matter, one set of regulations as to limitation should be established at once, and another and totally different set of rules should be provided to take effect at a date arbitrarily fixed at two years after the passing of the second Act. I cannot doubt that, if the period of limitation, and the qualifications contained in Act XIV had been in-

tended to apply to rents under Act X, the Legislature would have declared that these provisions should have come into operation at once.

It is equally difficult to understand why there should be a new classification of suits for rent to take effect at such future time.

Act X of 1859 is a special Statute applicable only to the Presidency of Fort William in Bengal, and containing a complete Code regulating the rights and duties of the agricultural population with respect to the occupation, management, and rent of land, and the recovery of such rent in Collector's Courts within that Presidency. Now it is a well known principle of legal construction that General Statutes are not to be taken as repealing Special Statutes, unless there is a clear expression of the intention of the Legislature to that effect. Mere general words are not enough. The rule which was stated by Judge Jenkyns in his "Eight Centuries of Reports," Case 41, p. 120, was recognized by the Lords Justices of Appeal in Chancery in 1853, the Trustees of the Birkenhead Docks *vs.* the Birkenhead Dock Company, 23 Law Journal N. S. Chancery, p. 457; and in 1861 by Vice-Chancellor Wood in Fitzgerald *vs.* Champneys 30 L. J. N. S. Chancery 777. The reason given by the Vice-Chancellor is as follows—"The Legislature having had its attention directed to a special subject, and observed all the circumstances of the case and provided for them, does not intend, by a general enactment afterwards, to derogate from its own Act where it makes no special mention of its intention so to do."

Secondly, the word "lands" in Clause 8 may have a sufficient meaning given to it by treating it as a term subordinate to houses, *i. e.*, as applying to houses *and lands appurtenant thereto* as distinguished from "lands, forest rights, fisheries, and the like" in the sense in which the word is used in Section 23 of Act X of 1859. It is a well settled rule that, in an enumeration of different subjects in an Act of Parliament, general words following specific words may be construed with reference to the antecedent matters, and the construction may be narrowed by treating them as applying to things of the same kind as those previously mentioned. Compare Comyn's Digest Parliament, R. 36—The King *vs.* the Manchester and Salford Waterworks 1 B. and C. 630—The East London Waterworks *vs.* Mile End Old Town, 17 Q. B. 512.

Again, looking at the history of the enactment of Clause 8 Section 1, we find that, as originally proposed, Clause 7 specially excepted "summary suits before the Revenue Authorities regarding arrears and exactions of rent." But after the passing of Act X, summary suits, except under Regulation V of 1822 of the Madras Code, were at an end; and the Clause was then amended so as to except such last mentioned summary suits only. This shews that, even before the passing of Act X of 1859, there had been an express intention to exclude suits for rents of land from the operation of Clause 8, and to deal with them by other legislation. I am, therefore, of opinion, that suits for arrears of rent under Act X of 1859 are not affected by Act XIV of 1859, because no "period of limitation" is by the last mentioned Act "made applicable to suits of that nature," so that the case is not brought within Section 1, and such suits are therefore not "suits to which the provisions of that Act are applicable" within Section 18 of Act XIV of 1859.

I have gone into this question at length, because our decision is at variance with the case of Syud Hossein Urkurree *vs.* Gobind Narain, Sudder Decisions, North West Provinces, 14th March 1863, p. 218.

Mr. Justice Levinge.—I concur in Mr. Justice Norman's judgment, having no doubt that the special provisions of Act X of 1859, regulating the recovery of rent in the Bengal Presidency, are not repealed or interfered with by the provisions of the general law, Act XIV of 1859, passed for the three Presidencies, and that this is the true legal construction to be given to these two Acts.

Mr. Justice Shumboonauth Pundit.—I agree with this opinion, though I see that in many cases this construction, which I am compelled to adopt, may perhaps operate as injurious to the extent of depriving redress altogether. I feel no hesitation in holding that cases under Act X of 1859, are not affected by Act XIV of the same year.

Justices Trevor and Loch.—The question which we have to determine in this case is, whether, in a suit brought under Act X of 1859 for arrears of rent, the special limitation of Section 32 of that Act applies, or whether those suits are governed by the provisions of Clause 8, Section 1, Act XIV of 1859. If the former law is applicable, a landlord will be able to institute a suit for arrears of rent at any time within three years from the last day of the Bengal year, or from the last day of the month of Jeyt of the Fussily or Willaity year in which the arrears claimed shall be due, as the land is

situated either in Bengal or elsewhere, whereas, if the latter applies, the landlord must bring his suit within three years from the time the cause of action arose, but he will, under Section 14 of the Act, be entitled, in the computation of the three years, to the exclusion of any period during which a *bonâ fide* suit upon the same cause of action against the same defendant or some person whom he represents was pending either originally or in appeal or both, and was dismissed for defect of jurisdiction.

It appears to us to be clear that the terms of Section 32 of Act X of 1859 are unaffected by the provisions of Act XIV of 1859 :—*First.* Inasmuch as a general law does not over-ride or repeal by implication a special law, the more especially when the two laws are enacted contemporaneously—*Secondly.* Inasmuch as the general law contemplates cases not falling within its provisions, and its terms are satisfied by the exclusion of these cases under Act X of 1859, and—*Thirdly.* Inasmuch as the differences in the law of limitation under Act X and Act XIV of 1859 are such as to show that those laws were severally enacted for different classes of cases, the law in the latter case not being applicable to the former; in other words, the causes which exist for the enactment of the general law do not exist in the subject matter of the special law; hence the difference between them.

The principle, that a general law does not derogate from a special one, admits of no question. It only remains to show that the subject matter of Act X of 1859 is of a special nature, whilst that of Act XIV is of a general. The title of Act X of 1859, which was passed on the 29th April of that year is "An Act to amend the law relating to re-"covery of rents in the Presidency of Fort "William in Bengal," and the Preamble of the law declares that it is expedient to re-enact, with certain modifications, the provisions of the existing laws relating to the rights of ryots with respect to various matters, to extend the jurisdiction of the Collector, and to prescribe rules for the trial of suits for the recovery of arrears of rents, and of suits arising out of the distraint of property for such arrears.

With the view of carrying out these objects, various rules were made, and by Section 32 it is enacted that—"Suits for the recovery of arrears of rent shall be instituted within three years from the last day of the Bengal year, or from the last day of the month of Jeyt of the Fussily or Willaity year, in which the arrears claimed shall have become due. For arrears of rent due at the passing of this Act, suits shall be brought within three years after the passing of this Act, or within the period now allowed for the institution of such suits in the Civil Court, whichever may first expire. Provided that, if the suit be for the recovery of rent at a higher rate than was payable in the previous year, such rent having been enhanced after issue of notice under Section 13, and the enhancement not having been confirmed by any competent Court, the suit shall be instituted within three months from the end of the Bengal year or the month of Jeyt of the Fussily or Willaity year on account of which such enhanced rent is claimed."

Now these are special rules for special points arising out of the special subject to which the Act refers, *viz.*, the transactions arising out of the relation which exists between landlord and tenant in the Presidency of Fort William in Bengal.

Turning to Act XIV of 1859, which was passed on the 5th May 1859, seven days subsequently to that on which Act X was passed, its title is "An Act to provide for the limitation of suits;" and its first Section enacts that no suit shall be maintained in any Court of Judicature within any part of the British Territories in India in which this Act shall be in force, unless the same is instituted within the period of limitation hereinafter made applicable to a suit of that nature, any law or Regulation to the contrary notwithstanding. The general nature of the subject matter of the Act cannot be questioned. It follows, therefore, the one Act being special and the other general, and both passed with only an interval of seven days, that they do not in the least interfere with each other. But it has been contended that, unless the latter over-ride the former law, its general and large terms are not satisfied, and this consideration must over-ride any technical rule of construction regarding a general law, not derogating from a special one. But the contention will not, it seems to us, admit of argument. The special law is only concerned with a special relationship within the Presidency of Bengal: the general law embraces all suits arising out of all relationships, except that special one, between man and man within the British Territories in India, including the Presidencies of Madras and Bombay. This area and these relationships are large enough to warrant the

use of the most general terms without interfering with the special contemporaneous law made regarding a particular relationship in a particular part of the country. Read by this principle, the very general terms of Section 1 of Act XIV embrace the various suits brought with a view of enforcing the obligations contracted by, and of repairing the injuries done by individuals not standing to each other in the relationship of landlord and tenant in Bengal; and simply import that, when concerning any suit falling within the general limitation law, there are, or shall hereafter be made, laws prescribing a shorter limitation for the institution of them, the shorter limitation shall prevail. Moreover, Section 18 of the law clearly shows that there are suits to which the provisions of the law are not applicable. It may, therefore, be asserted that the very general, though not absolutely universal, application of the law quite satisfies the large terms used in the law itself.

The separate reading of the two laws, which the rule of legal construction points to, not only satisfies the terms of both laws, but a reference to the subject matter of each of them explains the causes of the differences in them on the point to which the present discussion refers. In the special law, in cases that are between landlord and tenant, the demand is for rent. Rent is a demand arising yearly from the land, and must be satisfied yearly in order to enable the zemindar to pay his revenue. If the zemindar is a minor, whether under the Court of Wards or otherwise, he must, under the law in force, have a manager to whom they are to be paid, and who is legally empowered to grant receipts and to institute suits for these rents on his behalf; and special tribunals have been established in which *alone* suits for rent can be adjudicated, no other Courts having jurisdiction over such matters in Bengal. Hence, in these cases, having once fixed the date from which time shall run, there is no necessity for any allowance on account of minority, or for time expended in suits brought *bonâ fide* upon the same cause of action and against the same defendant in any Court of Judicature not having jurisdiction; whereas, in other cases, from their variety, from the uncertainty as to the ability, power, or will of parties to take them up, and sometimes from the doubt as to the particular forum in which the suit should be brought, there is a necessity for not allowing time to run in the cases of parties under legal disability when the right of action first accrues, and a necessity also for excluding from the computation of time running against a suitor, that period during which a suit brought *bonâ fide* on the same cause of action against the same defendant may have been pending in a Court without jurisdiction. This diversity of position, arising from the different nature of the transactions and the parties to them, sufficiently explains the actual difference between the two laws and the reason of the same, and furnishes a conclusive proof that the intention of the Legislature was that these laws should be considered separate and distinct.

For the above reasons we have no hesitation in ruling that the terms of Section 32 of Act X of 1859 are altogether unaffected by the provisions of Act XIV of 1859.

The 20th January 1865.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice* and the Hon'ble C. Steer and E. Jackson, *Judges.*

Farmer (Powers of)—Assent to division of holding.

Case No. 1270 of 1864 under Act X of 1859.

Special Appeal from a decision of Mr. F. L. Beaufort, Judge of the 24-Pergunnahs, dated the 23rd of February 1864, *modifying a decree of Mr. W. Cardozo, Deputy Collector of Diamond Harbour, dated the 27th of November* 1863.

Huree Mohun Mookerjee (Plaintiff), *Appellant*

versus

Gora Chand Mitter and others (Defendants), and Brijo Mohun Bose (Claimant), *Respondents.*

Baboos Baney Madhub Banerjee and *Mohendrolall Shome* for Appellant.

HELD by a majority of the Court (*dissentiente* Steer, J.) that the farmer of a Government khas mehal, as the party entitled to the rents, can accept a surrender of a tenure, and therefore is competent to assent to the division of a ryottee holding within his farm into several separate and distinct holdings.

Mr. Justice Steer.—THE case out of which the question to be decided arises, may be put in a few words.

A farmer had a rent-roll made over to him in which was recorded a holding, one and entire, in the name and occupancy of A; he allows it to be divided between A, B, and C.

Quære. When the estate reverts to the zemindar on the termination of the farmer's lease, is he bound to recognize the division

of the holding of A as separate and distinct holdings between A, B, and C, because it was sanctioned by the farmer?

It seems to me that a zemindar is not bound to allow a holding to be split up into several holdings, and to recognize the several holders as holders of separate and distinct holdings, because the farmer permitted such an arrangement. The farmer was, no doubt, competent to take the rent of a holding in A's name, from A, B, and C, according as they had apportioned the land and its rent among them. But if A, B, and C, desire that this arrangement should have force and efficacy after the termination of the farmer's lease, it was their duty to go to the zemindar, and to obtain his sanction to the arrangement. Not having so done, they are not in a position to plead to the suit of the zemindar against A for the entire rent of A's holding that the zemindar is bound by the act of the farmer to relieve A of so much of the rent of A's tenure as the farmer had allowed to be transferred to B, and C.

In this view, I would reverse the judgment of the Judge, and allow the zemindar to recover his entire rent as sued for, and not hold him bound to take his rents from the different parties among whom the holding has been divided.

Mr. Justice Jackson.—This was a suit for arrears of rent. The plaintiff is the proprietor of an estate which he has purchased at an auction-sale from the Government, which formerly held the estate as a Government khas mehal. The plaintiff alleges that the only rent-roll which was made over to him by the Government after the sale was one of the year 1238; that in this rent-roll he finds that the defendant's ancestor Gora Chand Mitter is recorded as holding the jumma according to which the present claim is preferred. The defendants urge non-liability as respects 14 beegahs 15c. 1d., which they state was transferred to a third party, Brojo Mohun, 8 years ago, the transfer being accepted by the ijaradar on the part of the Government. The plaintiff, however, asserts that the acts of the ijaradar are not in any way binding upon him as the present representative of the Government; those acts not having been sanctioned or ratified by the Government.

The first Court was of opinion that the plaintiff was not bound by the acts of the ijaradar, and that the defendants were liable for the whole sum claimed.

The Judge decided that the "ijaradar had "power to admit such transfers as this; that "he might not create tenures which would "exist after the termination of the ijara; but "in sanctioning a transfer he creates nothing, "and his sanction is good permanently. He "is in fact the agent and representative of "the zemindar."

The Judge accordingly modified the decree of the first Court, and declared defendant not liable for the rent of the land which had been transferred to Brojo Mohun.

On special appeal it is said again that the acts of the ijaradar are not binding on his zemindar; and it is contended that, if it is ruled that the ijaradar is able to bind his zemindar by such acts, he might do, in private, injury to the estate.

The question of the authority of the ijaradar to sanction the transfer in question must, in my opinion, rest on the question of the extent to which he is an agent of the zemindar. The zemindar is at liberty to restrict the authority of the ijaradar as much as he pleases.

But the ijaradar has the full powers of the zemindar, if his authority is not restricted by the express terms of the contract entered into by them, or is not restricted by the acts of the zemindar shewing that he retained any portion of his duties in his own hands, or is not restricted by the custom of the country as regards such leases.

The plaintiff in this case demands that his rights under a rent-roll of 1238 shall be recognised, because the Government made over to plaintiff that rent-roll at the time of his purchase. But this seems to me a preposterous claim. The plaintiff cannot ignore all the acts of the zemindar and his representatives since the year 1238. The act of the ijaradar in allowing the transfer of a portion of the defendant's jote to Brojo Mohun, is one which I would hold to fall within the general scope of his duties as agent of the zemindar unless evidence is brought to prove the contrary. As such, I would uphold it, and dismiss this special appeal.

It is a common custom in Government khas mehals to make over an estate in farm for 20 years. The terms upon which such a farm is given are those which must bind all the parties dealing with the ijaradar. As a general rule when no distinct terms are laid down, the ijaradar is the agent of the zemindar to perform all the duties connected with the zemindary. It will be against his own interests to injure the estate in any way. If he acts in collusion with the ryots, and in fraud of his principal, his acts would not then bind his zemindar. But there is no

such allegation in this action. The act of the ijaradar in this case was nothing more than the common routine business of the estate, which it was his duty, as agent of the zemindar, to perform or abstain from, according as he considered would be best for the estate.

The Chief Justice.—The plaintiff is the owner of land which was formerly a Government khas mehal. He sues the defendants for the rent of a tenure, which, in a jummabundee, dated in 1238 B. S., stood in the name of Gora Chand Mitter, the defendants' ancestor. The defendants allege that 8 years ago, while the whole estate was let in ijara, beegahs 14-5c. 1d. were transferred to a third party, Brojo Mohun, and that the transfer was accepted by the ijaradar. I am clearly of opinion that the ijaradar, being the party entitled to the rents, would have had full power to accept a surrender of the defendants' tenure. Having accepted such surrender, he could have let out the lands surrendered, either as an entire holding to a stranger, or part to the old tenants and part to a new tenant as Brojo Mohun was. It may be that the defendants, by the division which took place, lost all their rights as old tenants, and are only entitled to consider their present tenancy as a right first acquired by the arrangement with the ijaradar. Be that as it may, I concur with Mr. Justice Jackson in thinking that the defendants are clearly not liable for the rent of any land which they then surrendered; and that, whether the case is viewed by the light of the ordinary principles of law applicable to such a case, or with reference to Sections 19 and 37 of Act X of 1859. In the case of Hurromohun Mookerjee *vs.* Ramcoomar Mitter, 1 Sutherland, page 225, the transfer appears never to have been recognized by the superior tenant or any person entitled to receive the rent.

The result is that the appeal is dismissed.

The 20th January 1865.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Jurisdiction.—Regular suit to set aside decision of Deputy Collector passed after the commencement of Act X of 1859, but in a suit brought before its passing.

Case No. 1707 of 1861.

Special Appeal from a decision passed by Moulvie Imdad Ali Khan, Principal Sudder Ameen of Shahabad, dated the 6th July 1864, reversing a decision passed by the Moonsiff of that District, dated the 8th January 1861.

Jankee Ram Misser and others (Defendants), *Appellants,*

versus

Ludhira Panday and others (Plaintiffs), *Respondents.*

Baboo Doorga Doss Dutt and *Moulvie Mahomed* for Appellants.

Baboo Kalee Kishen Sein for Respondents.

With reference to Section 151 and 160 of Act X of 1859. HELD that a regular suit will not lie to set aside the decision of a Deputy Collector given after that Act came into force in a suit instituted before it was passed.

BOTH parties before us admit that the only point to be decided by us in this case is, whether a regular suit can be brought to set aside the decision of the Deputy Collector, dated 25th January 1860, with reference to Section 160 Act X of 1859, which Act was passed on the 1st August 1859. The suit was instituted on the 28th June 1859, before the passing of Act X, but decided on the 25th January 1860 after the passing of the Act.

We think that, under this state of things, and with reference to Sections 151 and 160 of Act X of 1859, the party dissatisfied with the decision of the Deputy Collector of the 25th January 1860, should have appealed to the Judge as he had the power to do; and that a regular suit will not lie to reverse the decision of the Deputy Collector above referred to. We accordingly decree this special appeal, and reverse the order of the Court, dated 16th July 1863. But we think it is a case in which the costs should be paid by each party respectively,—the plea of jurisdiction being taken only at the last stage.

The 20th January 1865.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Suit for rent—Deduction for lands washed away—Onus probandi.

Case No. 2189 of 1864 under Act X of 1859.

Special Appeal from a decision passed by Mr. W. F. Macdonell, Officiating Additional Judge of Nuddea, dated the 14th May 1864, reversing a decision passed by

the Deputy Collector of that District, dated the 27th February 1864.

Mr. Thomas Savi (Defendant), *Appellant,*

versus

Obhoy Nath Bose (Plaintiff), *Respondent.*

Baboos Kishen Succa Mookerjee and *Prem Chand Paul* for Appellant.

Baboo Chunder Madhub Ghose for Respondent.

In a suit for arrears of rent, the defendant is entitled to a deduction for lands washed away. The whole *onus* lies on the defendant of proving the extent of deduction to which he is entitled, and of showing precisely what lands have disappeared. The plaintiff, in proving that full rent has always been paid, has proved a sufficient *primâ facie* case.

THE question raised in this appeal is whether in a suit for arrears of rent the defendant may not claim, and is not entitled to be allowed, a deduction on the ground that the whole or part of the land has been washed away. The lower Appellate Court has decided in favor of the plaintiff, holding that the defendant could claim no deduction in the suit, but must institute a separate suit for abatement of rent.

We think that the lower Court was wrong in the particular ruling complained of; but that, nevertheless, the judgment in favor of the plaintiff was correct, and must be upheld by us. We have no doubt that, in a suit for arrears of rent, the defendant is entitled to a deduction for lands washed away; but the whole *onus* lies upon the defendant of proving the extent of the deduction to which he is entitled, and of showing precisely what lands have disappeared; and the plaintiff, in proving that full rent has ever been paid, has proved a sufficient *primâ facie* case. We fully concur in the ruling of this Court in the case of Afsurooddeen *versus* Shorooshee Bula Dabee, (1, Marshall's Reports, *p.* 558) and in the following remarks made by the Court in delivering judgment:—"It was contended that "the respondent would not be entitled to "any diminution of rent if the land had been "washed away. But we think that he is so "entitled, unless there was an express sti-"pulation that he should pay, whether the "land was washed away or not. If a man "stipulates to pay rent, it is clear he engages "to pay it as a compensation for the use of "the land rented; and independently of Sec-"tion 18 Act X of 1859, we are of opinion "that, according to ordinary rules of law, if a "talookdar agrees to pay a certain amount of "rent, the tenant of it is exempt from the "payment of the whole rent if the whole of "the land be washed away, or of a portion of "the rent if a portion only be washed away. "According to English law, a tenant is en-"titled to abatement in proportion to the "quantity of land washed away, and he is "entitled to that abatement in a suit brought "by the landlord for arrears of rent. In "ascertaining, therefore, whether any and "what amount was due for rent in the year "1266, the Court must enquire whether any "portion of the talook has been washed "away, and if so, what is a fair deduction "to be made from the rent on that account." In an earlier part of the same judgment the Court lays down that "the fact of pay-"ment (of rent) from 1262 to 1265 afforded "*primâ facie* evidence of the liability of the "defendant to pay at the same rate for 1266, "and if the land or any part of it were wash-"ed away, the *onus* lay on the respondents "to prove it."

The case now before us was twice remanded by the lower Appellate Court for local investigation, and two different Deputy Collectors proceeded to the spot and investigated the matter. The result has been most unsatisfactory, because, as it appears, neither the plaintiff nor the defendant can identify the lands for the arrears of which the suit is brought, or say either where they are or where they were: and the defendant is wholly unable to prove what portion of the lands, or whether the whole of them, has been washed away. Inasmuch as the *onus probandi* appears on the remands to have been wrongly thrown upon the plaintiff instead of on the defendant, we might perhaps have been induced to send back the case for further enquiry, were it not evident that no good could possibly result from such a course. There have already been two local enquiries, and the defendant has twice attempted, but wholly failed, to prove that the whole or any portion of the lands in dispute have been washed away.

On the whole, we think that the decree appealed from must be confirmed, and the appeal dismissed. But as we uphold the decree on grounds different from those on which it was put by the lower Court, and as we think the point taken in appeal was good in law, the appeal is dismissed without costs.

Order accordingly.

The 21st January 1865.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice,* and Shumboonath Pundit, *Judge.*

Suit for a balance of rent as appearing by documents prepared by a putwarry—Failure of proof.

Case No. 2861 of 1864 under Act X of 1859.

Special Appeal from a decision passed by the Judge of Behar, dated the 4th August 1864, affirming a decision passed by the Deputy Collector of that District, dated the 21st April 1864.

Syud Muksood Ali (Plaintiff), *Appellant*,

versus

Byjnath Singh and others (Defendants), *Respondents.*

Mr. R. E. Twidale for Appellant.

Baboo Mohendro Loll Seal for Respondents.

The plaintiff claimed a balance of rent for bhaolee and other lands as shown by documents prepared by the putwarry. The defendant alleged that, if the genuine documents were produced, they would show that nothing was due from him. The Judge found the documents produced by the plaintiff not genuine. HELD that his suit was properly dismissed.

THE plaintiff came into Court, alleging that he was entitled to rent at a certain rate, and, in support of his allegation, adduced *likhitas* said to be prepared by the putwarry. The *likhitas* produced shewed bhaolee rents due for part of the land and contained an account of some admitted payments. The defendant, by his answer, denied that he had held the lands at the rents alleged by plaintiff, said that the *likhitas* produced were not genuine, and that if the genuine *likhitas* were brought into Court, they would show that he had paid all that was due from him.

The Judge finding the *likhitas* not genuine, and, disbelieving the plaintiff's case, dismissed his suit.

On appeal it was objected that the defendant admitting the tenancy, the onus of proving payment rested on him.

But we are of opinion that the Judge's decision was perfectly right. The rates, as well as the payment, were in issue. The bhaolee rents were supposed to be ascertained and stated in the *likhitas*, and the plaintiff came into Court founding his suit on those documents. As, therefore, he failed to prove them, we think his suit was properly dismissed. The appeal is dismissed with costs and interest.

The 21st January 1865.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and Shumboonauth Pundit, *Judge.*

Judge to decide on evidence, not on private knowledge, &c.

Case No. 2469 of 1864 under Act X of 1859.

Special Appeal from a decision passed by the Additional Judge of Backergunge, dated the 13th June 1863, modifying a decision passed by the Deputy Collector of that District, dated the 31st January 1863.

Meheroonissa (Plaintiff), *Appellant*,

versus

Bhashaye Merdha and others (Defendants), *Respondents.*

Baboos Onoocool Chunder Mookerjee and *Kalee Mohun Doss* for Appellant.

Baboo Kedarnath Chatterjee for Respondents.

A Judge ought not to import his own private knowledge or opinions into a case, but ought simply to decide the issues before him and on the evidence before him.

THE plaintiff, an ousut talookdar, sued the defendant, an howaladar, for the rent of certain lands after measurement at 12 annas per beegah. The plaintiff obtained a decree before the Deputy Collector. The defendant appealed to the Judge; the question raised by the appeal being simply whether the measuring rod should be 120 cubits, or 80 cubits as allowed by the lower Court. The Judge found that the rod should be 80 cubits.

But, acting apparently on some private knowledge, information, or opinion of his own, that the ousut talookdar had agreed with the superior holders to reduce the jumma of their howaladars and under-tenants in consideration of a reduction which they themselves had obtained, though no such point was raised upon the plaint, the answer, or the grounds of appeal, in all of which it was admitted that the rent was 12 annas per beegah, he proceeded to fix the rent at six annas per beegah according to the supposed arrangement.

The plaintiff appeals.

We are of opinion that a Judge has no business to import his own private knowledge or opinions into a case. He is simply to decide the issues before him and on the evidence before him.

And as upon the issues raised by the parties, who best know their own respective rights and interests, the finding that the measuring rod should be 80 cubits, was, in fact, a finding in favor of the respondent,

we are of opinion that his only course was to dismiss the appeal.

We accordingly reverse the Judge's decision, and affirm that of the first Court with costs and interest.

The 21st January 1865.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Jurisdiction—Suit for abatement by Putneedar—Refund of excess rent.

Case No. 2535 of 1864 under Act X of 1859.

Special Appeal from a decision passed by Mr. J. E. S. Lillie, Additional Judge of East Burdwan, dated the 19th July 1864, reversing a decision passed by Mr. E. Lockwood, Deputy Collector of that District, dated the 12th March 1864.

Prosunomoyee Dossee and others (Plaintiffs), *Appellants,*

versus

Soondur Coomaree Debia (Defendant), *Respondent.*

Baboo Brojendro Coomar Seal for Appellants.

Baboo Bama Churn Banerjee for Respondent.

A putneedar can sue for abatement of rent under Act X of 1859.

A claim for a refund of rent paid in excess must be brought in the Civil Court.

THE case must be remanded. The suit was on the part of a putneedar, claiming abatement of the jumma of his putnee to the extent of rupees 10-0-8, on account of lands taken for railway purposes, the abatement to take effect from the next year; as well as for a refund of the rents paid in excess from 1258 to 1267 at 10-0-8 per annum, amounting to rupees 153-12-7, or principal rupees 100-6-8, interest rupees 53-5-11.

The Court of first instance, the Deputy Collector, decreed the case. The Judge held that he had no jurisdiction, inasmuch as a suit by a putneedar for abatement of rent would not lie under Act X of 1859, a putneedar not being the ryot with a right of occupancy described in Section 18 Act X.

It has been ruled by a full bench of this Court on 18th December 1864, that a putneedar can sue for abatement of rent under Act X. The suit is remanded. The Judge will take up the appeal on the point whether the claim to abatement has been established or not.

The claim for a refund of the rent paid in excess must be brought in the Civil Court.

The 23rd January 1865.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Presumption of occupancy from Permanent Settlement—Pottah of later date—Notice of enhancement.

Case No. 2272 of 1864 under Act X of 1859.

Special Appeal from a decision passed by Mr. W. H. Brodhurst, Judge of Sarun, dated the 25th May 1864, reversing a decision passed by Mr. P. P. Carter, Deputy Collector of Chuprah, dated the 27th January 1864.

Luchmeepershad (Defendant), *Appellant,*

versus

Ramgolam Singh (Plaintiff), *Respondent.*

Baboo Roopnauth Banerjee for Appellant.

Baboo Goopeenauth Mookerjee for Respondent.

If a ryot pleads a holding for more than 20 years at a uniform rent on a pottah subsequent to the Permanent Settlement, the defence annuls the presumption to which he might be entitled, and the case must be decided according to the pottah.

A notice of enhancement can only have prospective effect.

IN this case plaintiff sued defendant for enhanced rents for 1269, 1270, and part of 1271. The notice to defendant was issued in Cheyt 1270.

Defendant's case was that he had all along paid a uniform rent under a mokurreree pottah.

The Deputy Collector held that the notice of Cheyt 1270 could be good only for the rents of 1271. He further found that defendant held the land for upwards of 23 years at a fixed rent, and therefore dismissed plaintiff's suit, not clearly finding whether the pottah was sufficient or not.

On appeal, the Judge held that the pottah pleaded by defendant was not proved, and decreed rent at 1 rupee 5 annas per beegah for part of 1271.

Defendant appeals specially, urging that, as the Deputy Collector found as a fact that the defendant had paid uniformly a fixed rent for more than 20 years, the presumption un-

der Section 4 Act X of 1859 would be that defendant had paid it from the time of the Decennial Settlement, that this presumption had not been rebutted by plaintiff, and that thus defendant's rent could not be enhanced.

On the other hand it was urged that defendant's pottah was admittedly of a date *after* the Decennial Settlement, and that this of itself rebutted the presumption which might arise under Section 4 Act X of 1859.

It has been ruled in the case of Rajah Munmohun Singh, dated the 12th August 1862, and Watson & Co., page 68 vol. 1, Marshall's Reports, that if a defendant pleads that he has held at the same rent on a pottah subsequent to the date of the Permanent Settlement, though upwards of 20 years, the defence annuls the presumption of law, and the case must be decided according to the pottah.

In this view we concur; and therefore consider that the special appeal must be dismissed as to the defendant's right to benefit in this case by the presumption referred to in Section 4. We also think the notice can only have prospective effect, and the enhanced rates only be taken for part of 1271.

The appeal is dismissed, accordingly, with costs here.

It is urged by respondent, that he is entitled to the 8 annas per beegah, the rate admitted by special appellant for 1269 and 1270; but if it be admitted, the respondent can take his own measures to realize.

The 24th January 1865.

Present :

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble Shumboonauth Pundit, *Judge.*

Appeal (by one defendant against order for joint kubooleut by two).

Case No. 2608 of 1864 under Act X of 1859.

Special Appeal from a decision of the Judge of Hooghly, dated the 18th June 1864, reversing a decree of the Deputy Collector of that District, dated the 29th January 1864.

Shibram Chunder (Plaintiff), *Appellant,*

versus

Poran Chunder Bagdee and others (Defendants), *Respondents.*

Baboo Banee Madhub Banerjee for Appellant.

Baboo Prosunno Coomar Sein for Respondents.

A Judge can, on the appeal of one defendant, reverse an order against two defendants for a joint kubooleut.

PORAN CHAND and Gora Chand being entitled to shares in a certain jote, the first Court ordered that they should execute a kubooleut to the plaintiff. Poran Chunder appealed and shewed that the plaintiff had only purchased the interest of a third share-holder, Hurro Chunder, and had no title to the shares of all the defendants. He reversed the decision as to both defendants.

The plaintiff appeals, and objects that, as Gora Chand did not appeal, the decision ought to stand as to him.

But the order having been against both defendants for a joint kubooleut, we think that the Judge had full power to set it aside altogether on the appeal of one.

We, therefore, dismiss this appeal with costs and interest.

The 25th January 1865.

Present :

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble Shumboonauth Pundit, *Judge.*

Section 7 Act VIII of 1859—Splitting of cause of action—Presumption from payment of subsequent rents (Applicability of).

Case No. 2613 of 1864 under Act X of 1859.

Special Appeal from a decision passed by Mr. W. T. Tucker, Judge of Backergunge, dated the 21st June 1864, reversing a decision passed by the Deputy Collector of that District, dated the 30th January 1864.

Raja Sutto Churn Ghosal (Plaintiff), *Appellant,*

versus

Obhoy Nund Doss (Defendant), *Respondent.*

Baboos Obhoy Chunder Bose, Hem Chunder Banerjee and *Kishen Kishore Ghose* for Appellant.

Baboos Kali Mohun Doss and *Romesh Chunder Mitter* for Respondent.

Section 7 Act VIII of 1859 does not require a plaintiff having several distinct causes of action against one defendant, to comprise them all in one suit subject to the hazard of forfeiting all those not included in the first suit, but only against splitting a cause of action.

Arrears of rent for successive years are several and distinct causes of action in respect of which a plaintiff may institute separate suits.

The presumption arising from proof of payment or recovery of the rents of subsequent years, is not applicable in a case in which there is evidence that the prior rents sued for are in arrear, and no distinct allegation or evidence that they have been paid.

THIS was a suit for the rents of 1267 and 1268, instituted on the 19th Aughran 1270. It is stated that the plaintiff had previously brought a suit for the rents of 1267 in 1268, which had been withdrawn upon a promise of the defendant's uncle, who was also his vakeel, to pay the amount. A suit for the rents of 1269 had been instituted on the 20th of Assar, and for the rents of 1270 on the 31st Srabun 1270, in which the plaintiff had recovered the rents for those years.

In the present case the defendant did not distinctly plead payment, but by his answer set up that, under the Circular Order of the 30th September 1847, and Section 7 Act VIII of 1859, the suit brought by the plaintiff for the rents of 1267 and 1268 is not admissible, inasmuch as he had sued for the arrears of rent for the years 1269 and 1270 without any mention of the rents of 1267 and 1268 which had fallen into arrears.

In his evidence before the first Court, he did not distinctly say that he had paid the rents for 1267 and 1268, but in a guarded and equivocating manner says that, "as to rents for years prior to 1269, a suit having been brought, with suit and without suit rents had been paid."

The Moonsiff and Deputy Collector of Bhadhoorpore, Moulvie Abdool Munsur, appears to have tried the suit very properly, and found that the rents of 1267 and 1268 had not been paid; and he gave a decree for the rents of 1268, and for so much of the rents of 1267 as were not barred by limitation.

The Judge on appeal reverses his decision on the ground, *first*, that as there was no mention of the rents of 1268 in the decree for the arrears of 1269, the present suit is barred under Section 7 of Act VIII of 1859. But arrears of rent for successive years are *several and distinct causes of action* in respect of which it is perfectly competent to the party entitled to institute separate suits. The facts of the case of Ranee Bhobosoondry *vs.* Bhugowan Chunder Mozoomdar, 24th June 1864, Revenue and Police Journal, page 14, which appears to be contrary, are not given; and we are by no means sure that the marginal note correctly represents the ruling of the Judges.

It certainly is not the true meaning of Section 7 that, if a plaintiff has ten several distinct causes of action against one defendant, he must comprise them all in one suit, subject to the hazard of forfeiting all those not included in the first suit. The commentator in Ramapersaud's edition of the Act clearly explains the objects of the Clause, by saying "this provides against *splitting a cause* of action."

Secondly.—The Judge says, referring to a decision of 21st of May 1862, that, when the payment of the arrears of subsequent years has been proved, the plaintiff must prove the alleged non-payment of the rent of previous years. He says that the plaintiff has given no proof whatever that the rent of 1267 or 1268 has not been paid, and the presumption is very strong that it has been paid. We are referred to a decision in Sutherland's Weekly Reporter, page 274, with which we entirely agree.

But such a presumption cannot and ought not to be made in favor of a defendant who does not clearly, distinctly, and honestly set up the answer that he has paid the rents of prior years.

In appeal the defendant made his point positively and decidedly enough. But in his answer, and in his evidence while he was in such a position that he might have been prosecuted criminally if he made a false statement on the subject, he never ventured to say that he had paid the rents of 1267 or 1268.

We have, therefore, no hesitation in saying that the ordinary and natural presumption, which usually arises from proof of the payment or recovery of the rents of subsequent years, should not have been applied in the present case; that as there was evidence that the rents were in arrear, and no distinct allegation or evidence that they had been paid, the Judge should not have presumed the existence of a matter not alleged by the defendant, but should have affirmed the decision of the first Court.

We reverse his decision, and affirm the decision of the first Court with costs and interest.

The 25th January 1865.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Clause 14 Section 1 Act XIV of 1859—Meaning of words "Rent-free."

Case No. 1544 of 1864 under Act X of 1859.

Special Appeal from a decision passed by Mr. F. C. Fowle, Judge of Rungpore, dated the 8th April 1864, *reversing a decision passed by the Deputy Collector of that District, dated the 31st August* 1863.

Janokee Bullub Chuckerbutty (Defendant), *Appellant,*

versus

Nobin Chunder Roy Chowdhry (Plaintiff), *Respondent.*

Mr. A. F. Lingham and *Baboo Banee Nath Bose* for Appellant.

Baboo Unoocool Chunder Mookerjee for Respondent.

The words "rent-free" in Clause 14 Section 1 Act XIV of 1859, are not used in contra-distinction to, but merely as showing the meaning of the term "lakheraj."

The Section applies only to cases in which title as lakherajdar is in dispute.

The defendant having, for more than 60 years, occupied lands in excess of the number of beegahs specified in his pottah, and the lands in question having always been deemed to form part of what was covered by the pottah, it was held that they had been occupied and enjoyed as the land included in the pottah since before the Decennial Settlement, and that they could not, therefore, be enhanced.

THIS suit was brought to recover arrears of rent at an enhanced jumma. It has been found by the lower Court—and, therefore, in special appeal, we must take it as a fact—that the defendant holds the lands in respect of which the enhanced jumma is claimed under, and as part of the lands included in, an old mokurreree pottah: that the pottah bears date prior to 1790: that the defandant, ort hose from whom he makes title, have occupied the lands in question rent-free ever since the pottah was granted, *i. e.*, for more than 60 years prior to the institution of the suit. The plaintiff caused the land held by the defendant under the pottah to be measured: and on measurement it appeared that the defendant had possession of 135 beegahs in excess of the number of beegahs specified in the pottah. The present suit was instituted by the plaintiff to establish his right to assess these extra 135 beegahs or to enhance the rent payable under the pottah. The defendant pleads that, under the circumstances, the suit will not lie, and that he has a right to occupy the lands as he has done for more than 60 years. He also pleads in bar Clause 14 of Section 1 of Act XIV of 1859,—not setting up any lakheraj title, but arguing that the land is "*rent-free land*" within the meaning of that Clause.

We do not think the defendant can come in under Clause 14 of Section 1 of Act XIV of 1859, becase we consider that that Clause applies only to cases in which title as lakherajdar is in dispute. The words "rent-free" are not used as in contra-distinction to "lakheraj," but merely as showing the meaning of the term, or giving the English for the word "lakeraj." But, looking at the whole circumstances, at the great length of possession which the defendant has had, and at the fact that the lands in question have always been deemed to form part of what was covered by the pottah, we are of opinion that the pottah must now be taken to have, in fact, included, and to have been intended to include, these lands. Although the pottah specifies the number of beegahs which it is suppose to cover, we do not think it is to be construed as a pottah of so *many* beegahs, and no more: we rather read it as a pottah of *certain lands*, the number of beegahs being added more by way of description than of limitation. It is well known that measurements given in pottahs like the one before us, and of the date which it bears, were not such close or precise measurements as would be given in a pottah granted at the present day. Further, as the rent is sought to be enhanced in respect of lands in excess of the number of beegahs specified in the pottah, this difficulty arises in the case—that it is now impossible to identify the particular parcels in respect of which the enhanced rents are sought; and it is impossible to say that, if the Court enhances, it does not thereby put on certain portions of land which really were included in the pottah a higher rate than was stipulated for in the pottah.

On the whole, we consider that the lands, the rent of which it is sought to enhance, have been occupied and enjoyed as the lands included in the pottah, since before the Decennial Settlement; and that, under such circumstances, they cannot now be enhanced. We, therefore, decide in favor of the appellant, and reverse the decision appealed from with costs.

The 26th January 1865.

Present:

The Hon'ble C. Steer and E. Jackson, *Judges.*

Enhancement (Ryot when liable to).

Case No. 2629 of 1864 under Act X of 1859.

Special Appeal from a decision passed by Mr. E. S. Pearson, Judge of Tirhoot, dated the 18th May 1864, *affirming a decision of the Deputy Collector of that District, dated the 4th August* 1862.

Sheikh Sobhee and others (Defendants), *Appellants,*

versus

Chummun Lall Chowdhry and others (Plaintiffs), *Respondents.*

Baboo Debendro Narain Bose for Appellants.

Mr. J. Baptist and *Moonshee Ameer Ali* for Respondents.

A ryot is not liable to pay any higher rent than that which he has always paid until the landlord sues him for enhancement, or can show that the defendant has agreed to pay a higher rent.

THIS was a suit for arrears of rent from the year 1259 to the year 1266 at the rate of rupees 42 per annum. The defendant alleged that he held the land under a mukurreree title, and that he paid an annual rent of 8 annas a beegah, making a total of about 5 rupees. The first Court found that the mokurreree title was not valid, and decreed the claim. The Judge, on the appeal of the defendant, has found that the defendant sought to establish his mokurreree title in a suit in the Civil Court, but that it was then ruled that his right, if any, to such a title had fallen with the rights of the lakherajdar who had granted that title when the lakheraj was resumed. The Judge goes on to say that, as the defendant has taken no exception to the accounts filed by the plaintiff, there can be no doubt that they are correct, and the plaintiff is entitled to a decree.

It is urged on special appeal that if, on this finding of the Judge that the mokurreree title has become invalid, it is not decided, as the first Court apparently had decided, that there had been no mokurreree at all—and that there was such a mokurreree is proved by a decision of the Civil Court, in which it was established against the lakherajdar—the plaintiff would not be entitled to a higher rent than the defendant had paid under that mokurreree until his right to such higher rate was established. It is said also that the Judge is wrong in saying that the defendant did not, in his answer, impugn the correctness of the plaintiff's accounts, as in that answer he alleged that he had never paid more than 5 rupees per annum, and denied that he had ever paid the rent of 42 rupees which was entered in them.

We think the Judge's decision in this case does not dispose of the points which were raised before him on appeal. The defendant's answer does deny that he is liable to pay the annual rent which the plaintiff demands, and thereby objects to the plaintiff's accounts. If the defendant cannot assert any mokurreree title, and it appears from the Civil Court's decision that he cannot, it does not follow that his rent for the past 11 years is to be enhanced from 5 rupees to 42 rupees per annum. There seems no doubt that the defendant is an old ryot of long standing; and he is not liable to pay any higher rent than that which he has always paid until the plaintiff sues him for enhancement, or can show that the defendant has agreed to pay a higher rent. It may be that the Judge may consider that the allegation of a mokurreree title is all false; and that the plaintiff has always paid rent at the rate demanded by plaintiff, though it would be difficult to come to such a conclusion with the Civil Court's decree which the defendant holds, establishing his title against the lakherajdar. However this may be, the decision of the Judge at present is insufficient. He must decide what rent the defendant is liable to pay, whether the 42 rupees per annum claimed by plaintiff, or the 5 rupees offered by defendant; and it will be for plaintiff to prove that the defendant either has always paid the rent he claims, or that he has agreed to pay it since the plaintiff came into possession of the estate on his settlement with Government.

Another point raised on special appeal is that, on the face of the plaint, it is evident that the greater portion of the plaintiff's claim is barred by limitation. We find that

this is correct. The plaintiff is entitled only to that portion of the arrears of rent claimed which is due for the three years prior to the date of institution of the suit, and the Judge will not decree arrears for any portion of any later period.

The Judge's decision is reversed, and the case remanded for re-trial.

The 26th January 1865.

Present:

The Hon'ble C. Steer and E. Jackson, *Judges.*

Resumption Suit—Quantity of land.

Case No. 2702 of 1864 under Act X of 1859.

Special Appeal from a decision passed by Mr. A. A. Swinton, Judge of Tipperah, dated the 23rd June 1864, affirming a decision of the Deputy Collector of that District, dated the 14th April 1864.

Murriam Bebee (Defendant), *Appellant,*

versus

Beerchunder Jooboraj Gossamee (Plaintiff), *Respondent.*

Baboos Romesh Chunder Mitter and *Lukhy Churn Bose* for Appellant.

Baboo Dwarkanath Mitter for Respondent.

In a resumption suit only the validity or invalidity of the lakheraj, and not the quantity of land, is decided.

THE plaintiff, zemindar, having obtained a decree for resumption of certain lands against the defendant, a lakherajdar, now sues for a kubooleut, for the rent of those lands. The defendant's answer is that the extent of the lands has been wrongly stated by the plaintiff; that she holds less land than that for which the plaintiff demands rent.

Both Courts have refused to enquire into the plea, and have awarded plaintiff a decree for the rent of the whole extent of land as claimed, because the defendant in the resumption suit raised no objection as regards the quantity of land in her possession. The defendant protested before the Judge that the only question at issue in that suit was the validity or invalidity of the lakheraj title, and that the issue as to quantity of land was not material, and certainly was not raised or decided. But the Judge notwithstanding declined to go into the question.

The Judge is clearly in error. He must try the issue as to what quantity of lands defendant holds, and decree plaintiff's suit for that extent of land only. The case is remanded to him for this purpose, and the former judgment reversed.

The 26th January 1865.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Enhancement—Uniform payment for 20 years—Forged Pottah.

Case No. 2067 of 1864 under Act X of 1859.

Special Appeal from a decision passed by Mr. J. R. Muspratt, Judge of Purneah, dated the 21st April 1864, affirming a decision of Moulvie Hamidooddeen, Deputy Collector of that District, dated the 27th November 1863.

Mr. A. J. Forbes and another (Plaintiffs), *Appellants,*

versus

Nund Coomar Mundul (Defendant), *Respondent.*

Mr. T. T. Forbes for Appellants.

Baboo Tarucknath Sein for Respondent.

The defendant pleaded uniform payment for 20 years, and claimed the presumption created by Section 4 Act X of 1859, strengthened, as he alleged, by the fact of his vendor having held under a pottah dated prior to the Permanent Settlement. The Judge having found that pottah to be fabricated, it was held in special appeal that the defendant was not entitled to the benefit of the presumption, nor could he be permitted to reap any benefit by his own fraud.

THIS was a suit for enhancement after service of notice. The defendant, special respondent, pleaded that he held the tenure for 20 years paying at a uniform rent, and that he is entitled to the presumption which Section 4 Act X raises in his favor; and further, that this presumption is strengthened by the fact that his vendor held under a pottah dated prior to the Perpetual Settlement. The Judge has found that pottah to be fabricated. The special respondent is, therefore, not entitled to the benefit of the presumption under Section 4, nor can he be permitted to reap any benefit by his own fraud. The decision of the Judge is reversed. The plaintiff, special appellant, is entitled to enhance, and the Judge must decide what are fair and equitable rate.

Case remanded for that purpose.

The 27th January 1865.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Suit for rent—Intervernor—Onus probandi.

Case No. 2633 of 1864 under Act X of 1859.

Special Appeal from a decision passed by Mr. W. B. Buckle, Judge of Moorshedabad, dated the 18th June 1864 affirming a decision passed by Baboo Chytun Kristo Singh, Deputy Collector of that District, dated the 26th February 1864.

Kishen Chunder Doss (Plaintiff), *Appellant,*

versus

Buratee Sheikh (Defendant), and others (Intervenors), *Respondents.*

Baboo Goopenath Mookerjee for Appellant.

Baboo Doorgadoss Dutt for Respondents.

When a third pary intervenes in a suit for rent, according to Section 77 Act X of 1859., the *onus* of proving actual receipt and enjoyment of rent is on the intervenor and not on the landlord.

THE point at issue in this case has not been properly enquired into by the lower Court. The special appellant (plaintiff in the Court below) sued his ryot for rent. Special respondent intervened, claiming the property and the right to collect the rent of it.

The Judge, in a very meagre and unsatisfactory decision, upholds the decision of the Deputy Collector, which threw out the special appellant's claim on the ground that he had not been able to prove receipt of rent from the tenant.

This was, we observe, a wrong view of the law, Section 77 Act X of 1859 lays it down that, where a third party intervenes, as in the present case, the question of the actual receipt and enjoyment of rent by *that* party is to be enquired into; in other words, an intervenor coming between landlord and tenant and claiming the right to receive rent from the latter, is very properly made to prove his allegations, and to show that he has before received and enjoyed the rent he claims. The *onus probandi* is laid upon him.

In the present case the lower Courts have placed it on the plaintiff; he has been obliged to prove the receipt of rent, whereas by the terms of the Act, the intervenor, who appears to dispute the right, is the proper person to prove his own enjoyment thereof.

We remand the case, therefore, to the Court of first instance, in order that the Deputy Collector may call upon the intervenor to prove his previous receipt and enjoyment of rent; if he fail to do that, the special appellant will of course (as the ryot admits his right) be entitled to a decree.

The 27th January 1865.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Splitting of cause of action.

Case No. 2550 of 1864 under Act X of 1859.

Special Appeal from a decision passed by Mr. C. Hobhouse, Judge of Midnapore, dated the 11th June 1864, affirming a decision of the Deputy Collector of that District, dated the 22nd March 1864.

Rajah Ojoodhearam Khan (Defendant), *Appellant,*

versus

Nilkunt Mytee, Gomashta of Moulvie Syud Sudderooddeen Ahmed (Plaintiff), *Respondent.*

Baboo Kallee Prosunno Dutt for Appellant.

Baboo Mohendo Lall Seal for Respondent.

Several parcels of land were held under one pottah by which the ryot was bound to pay one lump sum as rent for all. HELD that the landlord's having recently kept separate papers as to each parcel, and dealt with each parcel separately, does not amount to a departure from or waiver of the original contract contained in the pottah so as to entitle him to split up his claim, and sue separately for the rent of each parcel.

THE only question which arises in this appeal is whether the suit has been rightly brought. The plaintiff has brought a series of suits for the rent of as many parcels of land. The defendant pleaded in the lower Court (and repeats the objection before us) that the whole of these parcels are held by him under one pottah, by which he is bound to pay one lump sum as rent for all. His contention is that only *one* suit will lie for all the rent claimed under the pottah, and that the plaintiff cannot split up his claim and sue separately for the rent of each parcel. The lower Appellate Court, while holding that the pottah was such as has been above described, was of opinion that it was proved that the parties had recently treated the parcels as separate, and had kept separate papers and made separate payments in respect of them. The Court considered that the contract

contained in the pottah had been departed from and waived by the parties, and therefore that the parcels might be treated as distinct, and distinct suits might be brought for the rent of each parcel.

We think that the lower Court has erred in finding that the acts of the parties amount to any such departure from or waiver of the original pottah as will sustain the present suit. The pottah is an old mokurreree, bearing date prior to the Decennial Settlement. It is only so recently as the year 1267 and 1268 that there is any evidence whatever of the parcels being dealt with separately by the parties; and it is found as a fact that about the same time, or a little earlier, suits were instituted against the defendant, in which the pottah and the lands covered by it were treated as a whole, and there is no evidence of any suit in which it has been treated separately. Under these circumstances, we can see nothing in this case from which the Court can legally infer any intention on the part of the plaintiff to vary the contract contained in the pottah, or waive any of his rights under it. We cannot see that his having recently kept separate papers as to each parcel and dealt with each parcel separately, is any indication even of an abandonment by him of his pottah, or of any of its provisions. We therefore allow the appeal with costs, and dismiss the plaintiff's suit. The lower Apellate Court will, with reference to the above remarks, consider the other separate suits which have been instituted relating to these parcels as quashed, without prejudice to the right of the plaintiff to bring a fresh suit for the whole in one lump sum.

The 27th January 1865.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Presumption of occupancy from Permanent Settlement—Section 4 Act X of 1859.

Cases Nos. 2536, 2537, 2538 and 2539 of 1864 under Act X of 1859.

Special Appeals from a decision passed by Mr. W. F. McDonell, Additional Judge of Nuddea, dated the 1st June 1864, affirming a decree of Baboo Tarrucknath Mullick, Deputy Collector of that District, dated the 27th February 1864.

Mun Mohun Ghose (Plaintiff), *Appellant,*

versus

Husrut Sirdar and others (Defendants), *Respondents.*

Baboo Gopaul Lall Mitter for Appellant.

Baboo Mohinee Mohun Roy for Respondents.

A plea of holding "for a long time from olden date from before" is not inconsistent with a holding from the time of the Decennial Settlement so as to deprive the defendant of the benefit of the presumption created by Section 4 Act X of 1859, which does not require a specific plea that the tenure was held at a fixed rent at the Permanent Settlement, but only proof of payment for 20 years at a fixed rate in order to raise the legal presumption.

In all these four special appeals the same point is raised, as is admitted by the pleaders on both sides, *viz.*, that *as* the defendant had *not* in *specific terms* pleaded in his answer to plaintiff's suit for enhanced rent that he had held at fixed rates *since the Decennial Settlement* he could not derive any benefit from the presumption in favor of this holding referred to in Section 4 Act X of 1859.

The following cases are cited by the appellant:—

1. Reazoonissa, vol. I, page 166, Police and Revenue Journal, 30th November 1863.

2. Ramnarain Singh, 24th June 1864, page 372, vol. II, of the above.

3. Radhamohun Mundul, 5th August 1854.

The first case does support the appellant's contention, but it was an *ex-parte* case.

In the second case the plea was that the tenure had been held for fifty or sixty years; but the Court remark that if they, defendants, had not said this, or "*held their tongues altogether*," the proof of fixed payment for twenty years would have sufficed.

In the third case the Judge only follows the two preceding cases without any remarks.

In these four cases now before us, the substance of the answer of defendants is that the tenure has, "from their father's time, and *for a long time from olden date from before*," been held at a fixed rate; and they prove to the satisfaction of the Courts below that they have paid uniform rates for more than twenty years.

Now what does Section 4 Act X of 1859 say? It says:—

"*Whenever*, in any suit under this Act, *it shall be proved* that the rent at which land is held by a ryot in the said Provinces *has not been changed for a period of twenty years* before the commencement of the suit, *it shall be presumed* that the land *has been held* at that rent *from the time of the Permanent Settlement*, unless the contrary be shewn, or unless it be proved that such rent was fixed at some later period."

We are of opinion that the substance of the pleading of defendants in these cases is sufficient to entitle them, on the evidence, to the benefit of the presumption referred to in Section 4. The plea of a "*long time from olden date from before*" is not inconsistent with the time of the Decennial Settlement. This plea is not like one of a precise term, 40, 50, or 60 years, which, on the face of it, shows that the time dates *after* the Decennial Settlement; but in that case the presumption would not be raised, the plea itself being inconsistent with and contradicting the presumption.

Looking then at the plea in these four cases, the terms of Section 4, which do not require a specific plea that the tenure was held at a fixed rent *at the Permanent Settlement*, but which only requires proof of payment for twenty years at a fixed rate in order to raise the legal presumption, which proof has been given in this case while the opposite party has shewn nothing to rebut

the presumption, we think that the plea taken is untenable, and we accordingly dismiss these special appeals with costs.

We would notice that, as the first case above cited was *ex-parte*, and the second was decided solely on the ground that defendant had pleaded that he had paid fixed rents fifty or sixty years, and that plea is not taken here, and as the third case only followed the two before cited, we do not think it necessary to refer these cases to a full Bench.

The 27th January 1865.

Present:

The Hon'ble C. Steer and E. Jackson, *Judges.*

Jurisdiction (Suit for confirmation of title and possession as Shikmee talookdar).

Case No. 2579 of 1864.

Special Appeal from a decision passed by the Principal Sudder Ameen of Dacca, dated the 11th June 1864, reversing a decision passed by the Sudder Ameen of that District, dated the 6th November 1862.

Brojo Soondur Mitter (Defendant), *Appellant,*

versus

Ram Chunder Roy and others (Plaintiffs), *Respondents.*

Baboos Grees Chunder Ghose and *Debendro Narain Bose* for Appellant.

Baboo Mohinee Mohun Roy for Respondents.

A suit for confirmation of the plaintiff's title and possession, as shikmee talookdar under the defendant, is not cognizable under Act X of 1859.

THIS is a suit for confirmation of the plaintiff's title and possession in certain lands as shikmee talookdar under the defendant. The suit was at first dismissed, but the Principal Sudder Ameen, on appeal, after sending for some evidence from the Collectorate, decreed it.

On special appeal, it is first argued that this was a suit by an under-tenant for possession of his tenure from which he had been dispossessed by the zemindar, and should, therefore, have been preferred under Act X. But it appears that, for at least a large portion of the land, the defendant admitted the plaintiff's possession, and that the real question at issue was the plaintiff's right and title. The plaintiff claimed to be a shikmee talookdar. The defendant alleged that he was a mere ryot. The Appellate Court found not only the plaintiff's title but also his possession to be proved. This ground of appeal cannot, therefore, stand.

Equally bad is the second ground that the Appellate Court did not assign reasons for admitting additional evidence. This is not such an irregularity as is sufficient to require us to interfere.

Appeal dismissed with costs.

The 27th January 1865.

Present:

The Hon'ble G. Campbell and E. Jackson, *Judges.*

Assessment of jungle land improved by ryot.

Case No. 2085 of 1864 under Act X of 1859.

Special Appeal from a decision passed by Mr. F. L. Beaufort, Judge of the 24-Pergunnahs, dated the 3rd May 1864, affirming a decision passed by Mr. W. Clementson, Deputy Collector of that District, dated the 16th March 1864.

Chowdhry Khan (Plaintiff), *Appellant,*

versus

Gour Jana and others (Defendants), *Respondents.*

Baboos Banee Madhub Banerjee and *Mohesh Chunder Chowdhry* for Appellant.

Baboo Chunder Madhub Ghose for Respondents.

A ryot, who brings jungle land into cultivation, is liable after a reasonable period to pay the full pergunnah rates of cultivated land.

A ryot, who does more than bring uncultivated land into cultivation, *i. e.*, converts, by means of special works and special labor, unculturable into culturable land, is entitled to hold at unexceptionably low rates (Campbell, J).

Mr. Justice Campbell.—This is a somewhat peculiar case. Plaintiff seeks enhancement on the ground of a contract expressed in a kubooleut to pay an enhanced rent whenever any one else may be willing to pay such higher rent for the land. It is not found expressly that defendant has a right of occupancy or otherwise; but the Kubooleut, reciting the rent at which defendant had previously held, *viz.*, Rupees 25, goes on to say that, whereas other ryots have submitted to an enhancement, he also consents to pay an enhanced rent of Rupees 30; and having advertence to those expressions and to the nature of this suit, we think that defendant

must be treated for the purposes of this case as an occupancy ryot.

Plaintiff then sues him for enhancement, *first*, on the special contract above cited, and *second*, on the general ground of enhancement, seeking to make him give a kubooleut at the rates prevailing in the neighbourhood for orchard land, *viz.*, Rupees 5, which would make the whole rent Rupees 75. The last increase to Rupees 30 seems to have been settled in 1265, only 5 years before the present suit, so that a very rapid increase is sought. It is found, with reference to the special contract, that there is not the least proof that any one is willing to give a higher rent for the land held by plaintiff; it is, therefore, unnecessary for us to consider, whether (supposing defendant to be an occupancy ryot) the contract would over-ride the provisions of Section 17 Act X of 1859. As respects the general right to enhance to neighbouring rates which, supposing defendant to have hitherto held at the highest rates obtainable from any class of ryots, might come to much the same thing as the special contract, it is found as a fact that great part of the land has been reclaimed from jungle, and made into orchard land by the agency and at the expense of the ryots; and, therefore, considering that the enhanced orchard value of the land as compared to its previous value represents the labor and capital of the ryot, and not that rent to which the zemindar is entitled, the Judge dismisses the suit. In this I think that the Judge is right. The zemindar is entitled to increase of rent on account of increased value of produce or productive power created "otherwise than by the agency and at the expense of the ryot." It seems then clear that increased value, created by the agency and at the expense of the ryot, is not a ground of enhancement, nor can rent be claimed at the rate paid by neighbouring lands, similar in quality to that which the labor of the ryot has created. If a ryot by his own labor and at his own expense converts one kind of land into another kind of land, he must pay the rates prevailing in the neighbourhood for land of that kind which he originally received from his zemindar, and he is subject to enhancement to the rates paid by the same class of ryots for neighbouring land of the same description as, and with similar advantages to, that which he originally received; he is also subject to increase on account of increased value of such similar lands, so far as there is increase independent of his own labor and capital.

In this case, plaintiff having specially sought to obtain orchard rates, and it being found that the orchard character of the land is not the character in which he received it from his landlord, but that which he has himself impressed on it, the suit for orchard rates is properly dismissed. It will be quite open to the plaintiff in another suit to sue for a kubooleut for another year at any enhanced rate which he can show that the general custom of the day, in regard to lands of the character originally let to defendant and to the payments of the same class of ryots, may warrant; also for such increase of rate as general increase of value independent of the ryot's exertions may warrant. Also, if there is question regarding the occupancy status of defendant, that also may be fairly put in issue in any future suit.

I dismiss the appeal with costs.

Mr. Justice Jackson.—I agree with Mr. Justice Campbell that the special appellant has not shewn sufficient grounds for any interference with the Judge's decision. Looking to the facts, it appears that five years ago the parties agreed that Rupees 30 was a fair rate for the land in suit. It was then jungle, and the tenant has since, by his own labor and at his own expense, cleared the jungle and made the land into an orchard. The plaintiff now demands an annual rent of Rupees 75, on the ground that neighbouring ryots pay a similar rate of rent for orchards in the neighbourhood. The Judge finds that the improved state of the land being caused by the exertion and at the cost of the tenant, there is no sufficient ground for raising the rent. Considering that it is only within the last five years that the improvements have been made, and that the tenant is undoubtedly entitled to some return for all the labor and capital he has expended on the land, I think the Judge is right in saying that it would not be fair and equitable to raise his rent now. But I do not consider that the tenant is at liberty to hold his land at the low rates for which it was originally given to him for all future time; and that it is, as between him and the landlord, to be always considered jungle lands. I think the the zemindar is entitled ultimately to share in the increased profits which the land produces, and to raise the rent to that which neighbouring orchard holders pay. But time must be allowed to the tenant to recover some of the outlay which he has made before he is called upon to pay the highest rate prevailing in the neighbourhood. Each case must rest on its

own merits. It is impossible to lay down any general rule. The ground for enhancemen being proved, it does not follow that the ryot must pay an enhanced rate. It may be that, looking to all the circumstances of the case, the rate already paid is still fair and equitable, and this will often be the case when the landlord comes in to enhance on the ground of neighbouring rates while the tenant claims that the rates already paid are sufficiently fair, looking to the improvements he has made on the land.

Mr. Justice Campbell:—I wish to explain that I, by no means, think that a ryot who takes jungle lands is to hold it for ever at jungle rates. I think that, when he simply brings jungle land into cultivation, then, after a reasonable period, he is liable to pay the full pergunnah rates of cultivated land. But if he has to do more than bring into cultivation uncultivated land, if the land which he originally received was not only uncultivated jungle, but was in its then state impraticable for cultivation—if it was salt land, which could only be made sweet by special works of the ryot, or rock which could only be made culturable by special labor—then I think that the ryot, who made those works or expended that special labour, would be entitled to hold at exceptionally low rates. So, again; if, having received ordinary land, he converted it into land of specially high value; then I think that he would not be liable to pay exceptionally high rates; but only the ordinary rates paid by land of the same quality, irrespective of the special character impressed on it by himself. If all the neighbouring land of the quality held by the defendant pays the rate claimed by the plaintiff, he would be entitled to that rate; but he is not entitled to the rate paid exceptionally by land of the same quality, when specially worked up into orchards, if the ryot and the ryot alone has impressed the orchard character on the land.

The 27th January 1865.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Jurisdiction (of Civil Court)—Plaint (reciting Ghatwally tenure but praying for reversal of an Act X decision).

Case No. 2605 of 1864.

Special Appeal from a decision passed by Lieut. R. C. Money, Deputy Commissioner of Manbhoom, dated the 28th June 1864, affirming a decision passed by the Moonsiff of Chatrá, dated the 31st January 1863.

Kristo Pershad Mookerjee (Defendant), *Appellant,*

versus

Heraloll Audhicary (Plaintiff) and others (Defendants), *Respondents.*

Baboo Opendro Chunder Bose for Appellant.

Baboo Annund Gopal Páléet for Respondents.

The mere recital in a plaint that the land in question is held under a Ghatwally tenure and is not mál, will not give the Civil Court jurisdiction, when the prayer of the plaint is for the reversal of an Act X decision and for the refund with damages of the monies recovered in execution.

THE special appellants contend that this suit was not cognizable by the Civil Court, and we think the contention sound.

The defendant, special appellant, sued the plaintiff, special respondent, as his ryot on a kubooleut for rent, and obtained a decree under Act X. The special respondent then institutes the present suit in the Civil Court to set aside the Act X decision, and for a refund of monies received from him in execution of that decree with damages. Such a suit will not lie in the Civil Court. The plaintiff's (special respondent's) remedy was by appeal to the proper Court.

The mere fact of there being a recital in the plaint, that the land is held under a Ghatwally tenure and is not mál, will not give the Civil Court jurisdiction, as the prayer of the plaint is for the reversal of the Act X decision, and the recovery with damages of the monies recovered in execution. The decision of the lower Court is reversed with costs and interests, payable by the special respondent.

The 27th January 1865.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Dismissal of suit—Non-appearance of plaintiff summoned as a witness by defendant—Time and manner of taking pleas.

Cases Nos. 2557 and 2558 of 1864 under Act X of 1859.

Special Appeals from a decision passed by the Judge of Midnapore, dated the 7th June 1864, reversing a decree of the De-

puty Collector of that District, dated the 30th March 1864.

Case No. 2557.

Bustee Narain Roy and others (Defendants), *Appellants,*

versus

Sham Soonder Nundee and others (Plaintiffs), *Respondents.*

Case No. 2558.

Sodanund Roy (Defendant), *Appellant,*

versus

Sham Soonder Nundee (Plaintiff), *Respondent.*

Baboos Opender Chunder Bose and *Mohendro Lall Shome* for Appellants.

Baboos Sreenauth Doss and *Hem Chunder Banerjee* for Respondents.

A Court is not bound to dismiss a case on account of the non-appearance of a plaintiff summoned by the defendant to attend as a witness, when the defendant did not petition for attachment or other legal process to be made by the Court to compel the plaintiff's appearance.

Pleas in special appeal should, by law, be taken distinctly and at a proper time.

THE pleaders on both sides admit that these two cases must be governed by one and the same decision in special appeal.

Plaintiff sued for rents for 1270 and 1271. Defendant pleaded that he was not liable, as plaintiff had, from the 1st Maugh 1271, prohibited the ryots paying defendant rents, which acted as an attachment.

The first Court found that there had been such prohibition by the plaintiff, and that so defendant had no means of realizing the rents from his under-tenants.

The lower Appellate Court reversed this decision, holding that there was no such prohibition or attachment.

The Judge found that the kubooleut of defendant, though not produced before the Court, attached liability to defendant to pay the rents, unless the plaintiff's prohibition to pay to defendant were shewn; and that the whole evidence considered by him did not lead to the conclusion that there was such prohibition. The Judge, therefore, dismissed the plaintiff's suit.

In special appeal by plaintiff it is urged,—

1*st*. That as the kubooleut was not before him, the Judge should not have relied on that.

2*nd*. That there was no legal evidence to support the finding.

3*rd*. That defendant summoned the plaintiff and took all necessary measures to cause his attendance; but the lower Appellate Court decided the case without examining him, and that, in the absence of plaintiff, the Court should have dismissed the case.

We do not think that the Judge relied on the kubooleut to prove that there was no attachment. He stated that *primâ facie* the attornment by kubooleut of defendant to plaintiff shewed the liability to pay plaintiff the rent. On the *second* plea we observe that it is now here, for the first time, stated that receipts for *arrears* of rent have been treated by the Judge as receipts for *current* rent. But if this was the plea upon which special appellants intended to rely, it should have been taken distinctly (as the law requires) in the memorandum of appeal. It was not so taken, and the respondent had thus no means to know on what distinct point he would have to answer. We cannot, therefore, admit the plea now.

On the *third* plea we remark that we are not shewn any petition by defendant for attachment or other legal compulsory process to be made by the Court to compel plaintiff to appear.

In such a case it was not for the Court to dismiss the case on account of the non-appearance of the party.

We see, therefore, no ground to allow this special appeal, and we accordingly dismiss it with costs.

The 27th January 1865.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Suit for rent and damages—Proof of past payments—Evidence.

Case No. 2060 of 1864 under Act X of 1859.

Special Appeal from a decision passed by Mr. F. Tucker, Judge of Shahabad, dated the 27th April 1864, *affirming a decision passed by the Deputy Collector of that District, dated the* 30*th September* 1863.

Ram Jeebun Lall (Defendant), *Appellant,*

versus

Nond Loll, Agent of Urjun Chobey, (Plaintiff), *Respondent.*

Baboo Otool Chunder Mookerjee for Appellant.

Moulvie Aftaboodeen Mahomed for Respondent.

In a suit for rent and damages in which the amount of rent payable is in issue, it is incumbent on the Judge to require the plaintiff to show that in past years the defendant has paid what the plaintiff is now demanding; and for the purpose of proving these past payments, the best evidence is requisite, secondary evidence being only admissible when the absence of primary evidence is satisfactorily accounted for.

PLAINTIFF sued for arrears of rent for 1268 and 1269, alleging that defendant holds 3-10 of nukdee land at the yearly rent of 16-15, and 32 beegahs of bhowlee land at 234-8-4, with interest and damages.

The defendat pleads that he only holds 30 beegahs of nukdee land at 1 Rupee per beegah, which he had paid.

The first Court found that defendant held the area of land of the different sorts as contended by the plaintiff, and he found from the papers that the sum of Rupees 251-7-7 was due to plaintiff. Allowing interest on this, and deducting the sum of Rupees 25 paid by defendant, he decreed Rupees 264-14-7 with 60 Rupees damages and costs to plaintiff. On appeal, the Judge accepted the danabundee chittas though not filed with the plaint, considered that there was no absolute necessity for filing the original danabundee papers, and on the evidence saw no reason for interfering with the lower Court's decree.

Defendant now appeals specially, urging that the Judge should not have looked at the documentary evidence of the plaintiff, which was not filed with the plaint. 2nd, That he should not have been contented with copies of papers until the absence of the original had been satisfactorily accounted for; and 3rd, That the Judge's enquiry is lamentably insufficient, and that the case should be remitted to him to be decided on the proper evidence, documentary and oral, if plaintiff is able to furnish such.

When this case was before us, another decision of the Judge of Shahabad, between the parties in the eye of the law identical, and decided on the 22nd January 1864, was placed before us. The Court could not but contrast the care and attention to the merits of the case paid by the Judge in the former suit with the perfunctory and incomplete enquiry which he has made in the present. In a case of this nature, in which the amount of rent payable is in issue, it is incumbent on the Judge to require the plaintiff to show that in past years defendant has paid what he, plaintiff, is now demanding; and for the purpose of proving these past payments, the best evidence, both documentary and oral, is requisite, and secondary evidence is not admissible until the absence of primary is satisfactorily accounted for. The Judge writes that a true account stating the defaulter's tenure, the quantity of land held by him, and the sum due is sworn to and attested by the claimant and the putwarees, are sufficient in ordinary cases. This may be so in cases in which the amount of rent demandable is not in question, but only the amount due. But, in a case like the present, it is clearly insufficient, for it requires every facility for a landholder and a putwaree in effect to enhance a ryot's rent without recourse to the legal steps or notice of enhancement required by law to support such an action. We, therefore, reverse the Judge's judgment, and remit the case to the Judge with directions that he will call on the plaintiff to produce his accounts for two or three years past in original to prove both the area of land and the rent paid by defendant according to his allegtion. The Judge will examine them minutely; and having attentively considered the plea of defendant, he will then, keeping in mind the line of reasoning and the result at which he arrived in the similar case above alluded to between these same legal parties, pass whatever order the circumstances of the case, as appearing from the whole evidence before him, may seem to him to require.

The 2nd February 1865.

Present:

The Hon'ble G. Campbell and F. A. Glover, *Judges.*

Suit for rent—Plea of waste and lakheraj land—Onus probandi.

Case No. 2481 of 1864 under Act X of 1859.

Special Appeal from a decision passed by Mr. C. Habhouse, Judge of Midnapore, dated the 14th June 1864, modifying a decision passed by Mr. C. Rattray, Deputy Collector of that District, dated the 17th March 1864.

Motee Lall Aduck and others (Defendants), *Appellants,*

versus

Judooputtee Doss (Plaintiff), *Respondent.*

Baboo Khetter Mohun Mookerjee for Appellants.

Baboo Mohesh Chunder Bose for Respondent.

In a suit for rent, when the ryot pleads that part of the land is waste and lakheraj, the *onus* is on the landlord to prove that such land has paid rent to him in previous years.

THIS was a suit for arrears of rent alleged to be due for the years 1268-69 and 70 B. S. on 22 beegahs, 6 cottahs, 2 chittacks of land,—plaintiff laying his claim at Rupees 185-4-12.

The ryots admitted a liability of Rupees 132-3-12; for the rest they pleaded that 4 beegahs of the land was their rent-free tenure, and 1 beegah, 16 cottahs, 9 chittacks waste, on neither of which had rent ever been or could be assessed.

The Judge decreed the entire claim in opposition to the decision of the Deputy Collector, who had deducted these two items.

We think that the case must go back, as the Judge has laid the *onus probandi* on the wrong party. The landlord came into Court claiming rent on the whole 22 beegahs, 6 cottahs, 2 chittacks, and was bound by the ordinary rule of law to start his case, and to show that the land, which the ryots claimed to be waste and lakheraj, and not subject to assessment, had paid rent to him. There is no evidence on the record on which we could decide the point ourselves, no sufficient jumma-wassil-bakee papers, and no kuboolet; whilst the result of the Ameen's enquiry is altogether adverse to the landlord's claim.

We consider that a party, suing in this shape for arrears of rent, and being met as in the present case, is bound to show that the land has paid rent to him in previous years; and that without such *primâ facie* evidence, the ryot is not bound to support his side of the question at all. On remand, the Judge will find whether plaintiff has proved that he has hitherto actually received the rent claimed by him.

The 2nd February 1865.

Present:

The Hon'ble Shumbhoonauth Pundit and A. G. Macpherson, *Judges.*

Jurisdiction (under Act X of 1859)—Admission of tenancy.

Case No. 2486 of 1864 under Act X of 1859.

Special Appeal from a decision passed by the Judge of Jessore, dated the 6th June 1864, reversing a decision passed by the Deputy Collector of that District, dated the 23rd April 1863.

Doorga Debia (Plaintiff), *Appellant,*

versus

Mr. John Beckwith (Defendant), *Respondent.*

Baboo Hem Chunder Banerjee for Appellant.

Mr. A. F. Lingham for Respondent.

An admission by a defendant that he is in possession under an agreement with the plaintiff and other shareholders that they would grant a mourosee pottah, which was never granted, and under which no rent has ever been paid, is not an admission of tenancy on which to found a suit under Act X of 1859.

WE are of opinion that the judgment of the lower Appellate Court is substantially correct, and that no such relation of landlord and tenant, as will support a suit under Act X of 1859, has been established in this case. It is said that the defendant admits in his answer that he is a tenant; but the admission is not of being a tenant holding from the plaintiff, but of being in possession under an agreement with the plaintiff's brother and the other shareholders (including the plaintiff) that they would grant a mourosee pottah which they have never granted, and the rent to be paid on which has never to this day been fixed. The suit is in truth not a simple suit for arrears of rent at all. It has been brought after great delay; and the dealings of the parties with the property have been so complicated that their position with reference to each other can probably not be ascertained without a regular account being taken in a Civil suit. As to whether the plaintiff, even in a suit in the Civil Court, could not find his right to what he claims, we express no opinion.

The appeal is dismissed with costs.

The 4th February 1865.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Jurisdiction—Default—Kuruk Sezawul (Appointment and Misfeasance of).

Case No. 2976 of 1864 under Act X of 1859.

Special Appeal from a decision passed by Mr. F. L. Beaufort, Judge of the 24-

Pergunnahs, dated the 11th August 1864, affirming a decision passed by Mr. R. T. Sevestre, Deputy Collector of that District, dated the 9th April 1864.

Anund Moyee Debia (Plaintiff), *Appellant,*

versus

Khirodhur Holdar and others (Defendants), *Respondents.*

Baboo Banee Madhub Banerjee for Appellant.

Baboo Opendur Chunder Bose for *Respondents.*

A lease empowered the landlord, on default of payment of any of the kists by the tenants, to appoint a kuruk sezawul, the tenants being responsible for any loss accruing. At default having occurred and a kuruk sezawul appointed, the landlord sued to recover the loss sustained by him. HELD that such a suit lies in the Civil, and not in the Revenue, Court.

THE plaintiff in this suit (special appellant before us) gave certain lands in farm to the special respondents, on the understanding (provided for in the lease) that if any of the kists remained unpaid, she should have the power of appointing a kuruk sezawul to make collections direct, and that should any loss accrue, the tenants should be answerable for it. A default occurred, and the kuruk sezawul was appointed, and the plaintiff now sues to recover the alleged loss.

The Judge held that the suit would not lie in a Revenue Court.

We think he was right. It appears from the record that the special appellant first sued the kuruk sezawul for the deficit, admitting that the ryots had paid their rent to him, and was cast; so that any claim special appellant may now have, cannot be considered in the nature of rent, but is a suit on a special contract. In point of fact, the farm determined on the appointment of the kuruk sezawul, and the present suit is to recover a loss sustained by the landlord in consequence of a separate arrangement made between him and the tenants.

The latter confessedly have paid all due from them as rent to the sezawul, so that the present claim is one not referable to the relationship of landlord and tenant as existing between the parties; but to a separate demand for loss consequent on the sezawul's misfeasance.

We have no doubt that such a suit lies in the Civil, and not in the Revenue Court, and we, accordingly, dismiss this special appeal with costs.

The 6th February 1865.

Present:

The Hon'ble C. Steer and E. Jackson, *Judges.*

Pottah—Rights under a new—Granted in perpetuity at the former rates.

Case No. 2604 of 1864.

Special Appeal from a decision passed by Mr. F. L. Beaufort, Judge of the 24-Perguunahs, dated the 18th June 1864, affirming a decision of Baboo Koylas Chunder Deb Bahadoor, 2nd Principal Sudder Ameen of that District, dated the 29th June 1863.

Ram Chunder Dutt (Defendant), *Appellant,*

versus

Romesh Chunder Dutt (Plaintiff), *Respondent.*

Mr. R. E. Twidale and *Baboos Debender Narain Bose* and *Onoocool Chunder Mookerjee* for Appellant.

Baboos Grija Sunkur Mozoomdar and *Kishen Kishore Ghose* for Respondent.

A person, by taking a perpetual pottah in 1237 at the same rate as the former holders, must be considered to have acquired a new tenure, and is not protected from enhancement on the ground that the former holders held at the present rate from 12 years before the Permanent Settlement.

THE defendant in this suit acquired by purchase the jotes of 57 ryots. In 1237, as he alleged, he got the then zemindar to give him a pottah in perpetuity for all these 57 jotes at the old rates. He contends in this suit for enhancement that, as he represents tenants who held their jotes at the present rate of rent from 12 years anterior to the Decennial Settlement, he is protected from enhancement under Clause 1, Act II of 1845.

We think that the defendant who alleges he took a pottah for his lands in 1237, at a fixed rate in perpetuity, is not in a position to say that he holds the same tenure on the same terms as the former ryots did. They might or they might not be in a position to say that their several jotes were protected from enhancement on the ground that they had held their lands at the present rates from 12 years prior to the Permanent Settlement. But the defendant by taking a pottah in 1237, on terms which the former holders are not shown to have enjoyed, acquired a new tenure; and unless his own title deed protects him from enhancement, he is not protected, though possibly all or some of the 57 ryots whose jotes he acquired by purchase, and which he might, if he had chosen, have held on the same terms as they did, might have been able to plead successfully that they were kuddeemee ryots, and not liable to enhancement.

In this view we dismiss the special appeal of the defendant with costs.

The 6th February 1865.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice,* and the Hon'ble Shumboonath Pundit, *Judge.*

Jurisdiction—Suit for abatement by Putneedars.

Case No. 1693 of 1864.

Special Appeal from a decision passed by Mr. O. Toogood, Judge of Beerbhoom, dated the 11th May 1864, reversing a decision passed by Baboo Sreenath Bidyabagish, Principal Sudder Ameen of that District, dated the 21st May 1862.

Man Gurobinee Dassea and others (Plaintiffs), *Appellants,*

versus

Khetter Chunder Ghose and others (Defendants), *Respondents.*

Baboo Sreenath Doss for Appellants.

Messrs. R. V. Doyne and *R. T. Allan* and *Baboo Rajender Misser* for Respondents.

A Civil Court has no jurisdiction to try a suit for abatement of rent by a putneedar. Such a suit must be brought under Clause 3 Section 23 Act X of 1859.

THIS was a suit by a putneedar for the recovery of excess rents alleged to have been paid by him to the zemindar, for abatement of rent, and to establish his right to a share of the compensation paid into the Collectorate for lands included under the putnee pottah, which had been taken for railway purposes.

The Judge, on appeal, decided that the terms of the plaintiff's putnee pottah pre-

cluded him from claiming abatement of rent; and as to the claim for a share of compensation, he referred the case for trial to the Principal Sudder Ameen.

With respect to the first point, the plaintiff appeals. We are strongly disposed to think that the Judge's decision on the first point is erroneous and contrary to a decision of this Court. But we are relieved from expressing a positive opinion by Mr. Doyne's pointing out that the Civil Court had no jurisdiction to try the question of abatement of rent, which should have been brought under Clause 3 Section 23 of Act X of 1859, according to the rules laid down by a decision of this Court, dated the 6th May 1863, and a recent decision of five Judges dated the 10th December 1864.

We are, therefore, bound to dismiss the plaintiff's appeal with costs and interest; and we order that so much of the Judge's decision and decree as relates to the claim to abatement be quashed.

As to the order of remand from which no appeal has been presented, we beg to call the Judge's attention to the provisions of Section 351 Act VIII of 1859.

The 7th Feburary 1865.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Suit under Section 102 or 103 Act X of 1859 (for recovery of voluntary payments made to stay sale in execution of decree against others).

Case No. 1694 of 1864.

Special Appeal from a decision passed by Mr. F. Tucker, Judge of Shahabad, dated the 5th April 1864, *reversing a decision passed by the Principal Sudder Ameen of that District, dated the 16th September* 1863.

Mirza Hukim Abdool Wahab (one of the Plaintiffs), *Appellant,*

versus

Mr. G. Drummond and others (Defendants), and the remaining Plaintiffs, *Respondents.*

Baboo Prem Chand Paul for Appellant.

Baboo Onookool Chunder Mookerjee for Respondents.

A person making voluntary payments in his own name to stay a sale in execution of a decree against others, cannot sue under Sections 102 or 103 of Act X of 1859 for the recovery of the money so paid by him.

In this case, the Jagheerdar, who is the only special appellant before us, deposited a sum of money to stay a sale of crops in execution of a decree against Musst. Putee Koer, and other ryots, whose personal property those crops are found as a fact to be; and he then sued to recover the money.

The Judge held, on appeal, that the Jagheerdar had no right to sue for the money, as the decree was issued against Musst. Putee Koer, and the ryots, as the crops attached were their's, not plaintiff's, and as the deposit would only be considered as recoverable on their suit.

We concur in this view. As the Jagheerdar made a payment voluntarily in his own name, when these ryots against whose crops the execution was alone, were justified to make the deposits, he cannot, we think, sue under Sections 102 and 103 of Act X of 1859.

We, accordingly, reject this special appeal with costs.

The 8th February 1865.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Rent—Obliteration of boundary marks.

Case No. 2490 of 1864 under Act X of 1859.

Special Appeal from a decision passed by Mr. W. F. McDonell Officiating Additional Judge of Nuddea, dated the 30th July 1864, *reversing a decision passed by the Deputy Collector of that District, dated the 14th May* 1864.

Brojonauth Roy (Plaintiff), *Appellant,*

versus

Mr. D. D. Gilmore (Defendant), *Respondent.*

Baboo Prosunno Chunder Mookerjee for Appellant.

Baboos Kali Kishen Sein, Sreenauth Doss, and *Bhuggobutty Churn Ghose* for Respondent.

A planter is not absolved from liability to rent in respect of land which he claims to hold under various tenures other than from the plaintiff, and which he has so covered with indigo as to have obliterated the boundary marks.

Plaintiff sued for rent of certain plots of land cultivated by defendant with indigo. There does not seem to have been any ex-

press contract; but plaintiff says that the defendant, an indigo planter, was suffered to sow with indigo the whole of the land among which his plots are situated, and that there is an implied contract to pay the customary rent. Defendant does not deny his liability to rent, but he denies that he holds of the plaintiff, alleging that he holds under Sarheesheekur, and others under various tenures. Sarheesheekur did not claim, but another party Bomashunker Sirdar claims the whole. The first Court, after a local investigation, decreed in plaintiff's favor. The Judge reversed the order on the ground that the local investigation showed that the whole plain was covered with indigo, that the boundary marks were obliterated, and it was impossible to make out whether the land claimed was really plaintiff's or not; therefore he dismissed plaintiff's claim as not proved.

We think that there has been an entire denial of justice in this case. Because the defendant has taken the whole plain and obliterated the boundary marks he is not to hold it free of rent. The Court must not shrink from the duty of doing justice. As defendant does not claim any proprietary right, he is clearly liable to pay rent to some one for his use and occupation; and the only real question seems to be, whether the plaintiff or the intervenor is entitled to the rent of the land claimed.

We remand the case with the directions that, since the indigo is no longer on the land, such further local investigation as may be necessary is to be held, and that it may be distinctly found whether plaintiff or any other party intervening has hitherto enjoyed the rents or produce of the lands in dispute. If plaintiff is really entitled to any land, that land must be ascertained; and it must be decided who is entitled by previous enjoyment to receive the rents of the land claimed by him.

The 9th February 1865.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and Shumboonath Pundit, *Judge*.

Limitation—Suit for rent after a decree for enhancement.

Cases Nos. 2891 and 2892 of 1864 under Act X of 1859.

Special Appeals from a decision passed by the Additional Judge of Nuddea, dated the 31st August 1864, *modifying a decision passed by Baboo Dinonath Addy, Deputy Collector of that District, dated the 8th July* 1864.

Joy Monee Dossee and others (Defendants), *Appellants,*

versus

Huronath Roy and others (Plaintiffs), *Respondents.*

Baboo Mohinee Mohun Roy for Appellants.
Baboos Banee Madhub Banerjee and *Sreenath Doss* for Respondents.

A landlord, after having obtained a decree for enhancement against his tenant, sued him for arrears of rent. HELD (with reference to Sections 30 and 32 of Act X of 1859) that the suit might be brought within one year from the date of the final decree fixing the rent in the suit for enhancement, or within three years from the end of the month of Jeyt of the Fusly or Willayuttee year for which such rent is claimed.

No. 289.

The Chief Justice.—This was a suit instituted on the 28th of Cheyt 1270 (April 23rd, 1864,) for the recovery of arrears of rents for 1266 and 1267. The Deputy Collector held that the claim for the rents of 1266 was barred by limitation under Section 32 of Act X of 1859.

On appeal, the Judge reversed this decision, on the ground that, as by a decree, dated the 30th of April 1862, made in a suit for enhancement instituted in 1266, an enhanced rent had been assessed upon the premises, and as this suit had been brought within three years from the date of that decree, it was within time.

The defendant appeals.

The question is, what is the period of limitation allowed by Act X in such a case?

First.—I may observe that it is an essential part of the definition of rent, that it should be certain. Until a rent has been definitely fixed and ascertained either by the agreement of the parties, or those to whose rights and liabilities they succeed, or by some decree of Court or arbitrators, there can, of course, be no such thing as an "arrear of rent." Accordingly the 22nd Section makes provision for two distinct species of suits, *viz.*, *first*, suits for "arrears of rent," and *secondly*, suits "for the recovery of rent "at a higher rate than was payabl ein the "previous year."

But the latter part of this Section has no application, to the present case, inasmuch as it relates only to cases of enhancement after notice where the enhancement has *not* been confirmed by any competent Court; and it provides a very short period of limitation, *viz.* three months after the end of Jeyt of the Fusly or Willayuttee year for which the enhanced rent is claimed—the object of such limitation being evidently that a ryot should not be left in doubt as to the extent of obligation he would incur in continuing to hold.

Where an enhanced rent is fixed or determined for the first time after the expiration of the year in respect of which the rent is claimed, I think it may be considered that it becomes due *as from a passed date* so as to enable the landlord to sue within three years from the end of the year in which the arrears would, if the rent had been previously fixed, have become due.

And thus in the present case, the plaintiffs might have sued within three years from the end of 1266.

But again, I think, he might frame his plaint thus—"that the defendant occupied certain lands belonging to him in 1266, at a rent not ascertained; that, in a suit for that purpose, that rent was fixed at an enhanced rate by the decree in the suit for enhancement, and thereupon the defendant became bound to pay rent at the enhanced rate for 1266." This plaint would show a cause of action, the limitation as to which appears to be not within Section 32, but within Section 30. The plaintiffs must, therefore, have sued within one year from the date when the rent was finally settled by the decree in the suit for enhancement.

We were referred to cases at pages 68 and 349 of Sutherland's Weekly Reporter. But they do not conflict with the opinions I have above expressed, in the case at page 142 of the same publication, the points now discussed were not raised.

As there is nothing upon the record to show when the final decree for the enhanced rent was given on appeal, the case must be remanded to the Lower Court for trial. If it appears that the final decree settling the rents was dated more than one year previously to the commencement of this suit, the decision of the lower Appellate Court as to the rents of 1266 will be reversed with costs in proportion.

This decision governs that in 2892 of 1864.

Mr. Justice Shumboonath Pundit.—In these cases, objection is taken to a part of the arrears decreed below, on the ground that, when sued for, it was due for more than three years, as mentioned in Section 32 Act X of 1859; that the consideration on which the Lower Court has held the claim for this portion of the rents to be tenable, is not required to be taken into account under Act X, whatever may be necessary in cases affected by Act XIV of 1859, which does not apply to cases for arrears of rent.

It has already been decided by a Full Bench decision of this Court, that cases under Act X are guided and ruled by the rules of limitation mentioned in the Act itself. In calculating the period of limitation, this law does not allow of any deduction being made for any period that another case for the same rights might have been pending in another Court, or even in the Collectorate, but in which no decision was passed on the merits. Nor is any deduction allowed, as was allowed under the old limitation law, even under Act XIV, much less under Act X of 1859, for any period that a plaintiff may, with reference to another suit by another or himself connected with the same property, or under the same right in some other form than now adopted by the said plaintiff, have found it hard or inexpedient to sue before the termination of the previous litigation.

In suits for rents, ordinarily, the cases that may have been instituted before between the plaintiff and the tenant he now sues, are likely to be: (1) cases for the reversal of a sale caused by the landlord for arrears of rent due to him, (2) cases for resumption of the tenure, (3) cases for fixing the right to assess or enhance with or without a prayer to obtain the rents of any particular year at the rate asked to be assessed or enhanced, or (4) cases for fixing the jumma, or (5) for abatement instituted by the ryot.

In the last two kinds of cases instituted by the ryot, the landlord may, during the continuation of this litigation, successfully sue for the old rents or admitted rents that he may have recovered before, though the tenant may become entitled in a case of abatement to ask for a refund of a portion out of the money so realized. In a case instituted by the tenant for setting aside the sale of his tenure, the landlord is entitled to recover the rents due after the sale from the purchaser as long as no decree is given in favor of the old ryot, and from this tenant himself from the time of his succeeding in obtaining an order for reversal. The right of the landlord to plead in appeal that the sale was legal and valid, cannot be injured by his recovering during the pendency of the appeal the rents from the tenant, who may have obtained a decree against him. Before Act X came into operation, these suits could be instituted by the landlords, and they can, after it came into operation, bring a suit, while any such litigation as is mentioned above may be pending against him so as not to allow any part of his claim to be affected by Section 32 of the said Act.

In a case, however, where the landlord may have unsuccessfully sued his tenant for the resumption of the tenure itself, it is quite possible for him to find that of the rents for which he could not sue at all while he was suing to oust the tenant, and for which he must now sue after the dismissal of his suit to resume, some portion has become affected by the limitation provided for in Section 32 of Act X of 1859. It is not for me to decide in this case, that the delay having arisen from the fault of the zemindar, the lawmakers had no sympathy for him, and so did not provide for any protection in a case like this. Perhaps he may sue for the whole of the arrears due to him under Section 30 of Act X of 1859, within one year of the dismissal of his former case. I have, however, no occasion to decide here that point. In a few cases for arrears of rent, when the delay in suing for the back rents had accrued owing to the previous litigation under both the heads mentioned above, I, sitting with another Judge, and I believe other Judges, have held that a portion of the claim was barred under Section 32. The view thus taken was simply based on the impropriety of allowing the deduction asked to be made in the calculation of limitation for

the period of the pendency of the previous litigation. This was a request which could not be allowed either under Act X, or under Act XIV of 1859. Whether, under Section 30 of the former Act, the plaintiff in these cases might have sued within a year of the termination of the previous suit, is a point that was not taken, or discussed, or decided. It may, however, happen that a zemindar may institute a case for the resumption of a tenure in 1860, which may last in different Courts up to the end of 1862, and he may not have realized the rents from the years 1860 down to 1862. If Section 30 alone applies to his claim for these rents, he must sue within 1863, for, if he were to sue after that year, he may be too late for all the rents; while, if he is allowed to fall back upon the provision of Section 32, he will be in time for all the rents if he sues in the beginning of 1863, and lose only one year's rent for as many years that he may delay to sue after the expiration of the year 1863.

It is, however, my opinion that a plaintiff in this position might sue under any one of these two Sections. In a case of enhancement, where there is first a litigation for proving the right to demand the increase and ultimately a decree against the landlord, it is possible for him to find, if he has not sued for the rents falling due during the period of the existence of this litigation, that a portion of his claim is barred by the provisions of Section 32. Now, this too is a case like the other, where the delay in suing arises from the pendency of a previous unsuccessful case to resume the tenure itself. In such a suit, while the suit for the right of enchancement was pending, the landlord had a right to sue at least for the admitted arrears at the old rates with a protest that he does not intend to lose his rights to the additional amount, when his right to demand the same may be decreed, and if he would follow this course, may, when ultimately it is decided that he has no right to enhance, have the satisfaction to find that he has not lost any portion of the arrears due to him under the limitation of three years provided in Section 32.

The difficulty, however, is practically felt in cases where the delay to sue arises owing to the existence of a limitation affecting the amount to be fixed, brought by the landlord and terminating in a decree in his favor. Now, these cases may be for assessment after resumption of a lakheraj, or for assessment itself under any other right, or for enhancement upon any contract, or upon any of the grounds upon which an increase may be asked and decreed.

In all cases for assessment, as well as for enhancement, under the old law, it was necessary to sue at the valuation of one year's jumma asked, and unless by chance, the prayer was not inserted in the plaint, or, in cases requiring service of notice, the notice alleged was not proved to be served, a decree was always given for the right to assess or enhance, as the case may have been, and for the rents of the year for which the suit was brought at the amount found and fixed as payable Under the new law, a suit may be brought for a kubooleut at a particular jumma, and it is not necessary to sue for a decree being given for the rents of any particular year at the rates to be fixed. This is equally the case, if the action be for assessment or for enhancement. In all enhancement cases, a notice before the beginning of the year for which an enhanced rate is asked, is required to be served on the tenant; and on proof of this service, the right to enhance, if decided in favor of the plaintiff, confers upon him the power to demand and receive the increased rents from the year following the notice. I omit altogether to notice a case in which the delay to sue for the arrears of a year affected by the limitation of Section 32, may arise from the fact that, in the previous case, the landlord had, on the allegation of service of notice, sued his tenant for the rents of that year, the case for some time remained pending in different Courts, and when at last it was decided in his favor, the decree was limited only to a right to enhance as he failed to prove that the notice was served. I equally omit to notice a case for a kubooleut, the decree in which may be limited only to the right to obtain a kubooleut at a particular enhanced rate, and does not go to the extent of awarding for any year the rents fixed, because the plaintiff had failed to prove, as he had asserted, that he had offered a pottah. These are cases in which the plaintiff alone has to blame himself, if, when he sues immediately after the decision of the previous suit, he finds that he is too late for the rents of any year.

In a case where the plaintiff chooses to ask only for the right, and accordingly to obtain a decree only for the same, it may fairly be said that it is partly his own fault when he did not ask for the rents of any particular year, while he was suing

for the declaration of his rights to assess or enhance. In all cases of enhancement, the claim is based upon a notice; and, I believe, the rent is asked at the enhanced rate from the time of notice. The proviso at the end of Section 32 makes an allusion to such a case and provides a short limitation for its institution. When the rent at the enhanced rate or the assessment for any particular year is asked in the first case for rents, it may happen that before it is finally decided, the rent for the next year is about to become affected by Section 32. In these cases, it is not fair to raise any argument regarding the plaintiff's fault and neglect like that I have used above, it may, however, be said that in these cases the landlord may institute an action for the enhanced rents of the subsequent year and so on for another year; and as the former case is still pending, these cases must be kept undecided, or put up, if possible, with the former suit, the result of which will, as a matter of course, decide the case or cases subsequently instituted. I have heard of such cases being brought, and also of a Lower Court having non-suited the plaintiff, and the High Court remanding them to the Lower Court to keep them, awaiting the result of the previous litigation. I hold that, in all cases of assessment, the plaintiff need not be compelled to sue for his rents of subsequent years pending the previous litigation. It may equally be argued that, if the landlord sues within one year of the final decree fixing the amount for the first year for which he may have sued before, or within the three years calculated under Section 32 from the years for which the arrears may be asked, he may be in time for the rents falling due subsequently. Also, where, from the nature of the suit, no rents at the enhanced rate are asked for any year, the landlord may sue for these rents within a year of the decree declaring the right of enhancement. It is evident that, under the proviso at the end of Section 32, the landlord *may* sue for the rents for which a notice may have been served, within a year and 3 months after the year in which the notice was served. It does not follow from this, that he cannot sue for such rents at any time afterwards within the three years mentioned in Section 32, or within one year of Section 30 Act X of 1859. Enhanced rents, it is true, cannot become arrears before they are adjudged and fixed; but it is no good argument to say that, when a proviso is made separately for suits for the first demand of enhanced rents, and separately for admitted and proved arrears, the enhanced rents cannot, after the right to demand them is decreed, be sued for within 3 years from the last day of the year for which they may be claimed. I cannot, however, with reference to the wording of the entire Section 32, hold that under this Section a landlord may be allowed to recover all the back rents at an enhanced rate for any number of years, provided the suit is brought within 3 years of the date of the decree fixing the amount of enhancement. I have already held he may do so within a year of the decree fixing the amount of rents.

In this case, the plaintiff is not suing for the rents of the year objected to within one year of the decree of the first Court fixing the enhanced rents; but as the date of the final decree in appeal is not disclosed on the record, and he may be in time from that date, it is necessary to remand the case to the Lower Appellate Court that it may, after ascertaining the date of the decree in appeal, decide the case with reference to the remarks recorded above.

The 10th February 1865.

Present:

The Hon'ble G. Campbell and F. A. Glover, *Judges.*

Ejectment (of ryot with right of occupancy though holding under a temporary pottah).

Case No. 2839 of 1864 under Act X of 1859.

Special Appeal from a decision passed by Mr. H. Madocks, Judge of Bhaugulpore, dated the 24th June 1864, *affirming a decision of the Deputy Collector of that District, dated the 26th August* 1861.

Sheeb Dyal Pauleet and others (Defendants), *Appellants,*

versus

Dwarkanauth Sookul and another (Representative of Plaintiff), *Respondents.*

Baboo Roopnauth Banerjee for Appellants.

None for Respondents.

A ryot with a right of occupancy, though holding under a temporary pottah for a term of years, cannot be ejected by his landlord, unless the latter can prove a stipulation under Section 7 Act X of 1859.

THE question in this case was whether, plaintiff, a ryot, ejected by the zemindar, had a right of occupancy? The Court below finds that, in fact, plaintiff has proved his holding from as far back as 1247, or for 20

years. Defendant seeks the benefit of Section 7 of Act X of 1859, alleging that plaintiff held under a temporary determinable lease. A pottah for a term of years is not necessarily inconsistent with a right of occupancy, since temporary settlements of the rents of tenures held at variable rates are often made for a term of years. But, if the lease was of the nature of a temporary lease with right of re-entry in favor of the landlord, that would give the landlord a right to over-ride the provisions of Section 6. It rests on the landlord to prove a stipulation under Section 7. In this case, he has entirely failed to do so; and his assertion, without proof, is unavailing.

Defendant further alleges that arrears of rent were due. This was not included in the remand order, and it is doubtful whether any such plea would justify the forcible ejection of an occupancy ryot; it rather appears that the landlord is strictly bound to proceed under Section 78. At any rate, no arrear of rent has been proved in this case, and the appeal is dismissed.

The 10th February 1865.

Present:

The Hon'ble C. Steer and E. Jackson, *Judges.*

Jurisdiction (of Civil Court)—Suit between ryots.

Case No. 2445 of 1864.

Special Appeal from a decision passed by Mr. A. Pigou, Judge of Hooghly, dated the 18th June 1864, reversing a decision of the Additional Sudder Ameen of that District, dated the 7th January 1864.

Bhuggobutty Churn Mookerjee (one of the Defendants), *Appellant,*

versus

Hurmohun Mookerjee (Plaintiff), and others (*proformâ* Defendants), *Respondents.*

Baboos Kishen Succa Mookerjee and *Bama Churn Banerjee* for Appellant.

Baboos Banee Madhub Banerjee and *Mohendro Lall Shome* for Respondents.

A ryot and zemindar were sued by a party who held a pottah under the zemindar. The ryot defendant alone appeals. HELD that, though it was competent to the zemindar to object to the jurisdiction of the Civil Court, it was not competent to the ryot to do so.

Quære.—Whether (the zemindar having retired from the contest, and the case involving a question of title between two ryots) it is not a matter to be tried by the Civil Court.

THE plaintiff is a purchaser from a party who holds a pottah under the zemindar defendant.

Both the ryot defendant and the zemindar defendant plead that the suit ought to have been brought under Act X of 1859, and both deny that the land in dispute is included in the plaintiff's vendor's pottah, or that he was ever in possession.

The Judge was of opinion that the suit was rightly instituted in the Civil Court; and he found upon the facts that the land was included within the northern boundary of the pottah held by the plaintiff, and that he had been all along in possession of it.

The ryot defendant alone appeals, and his pleader still urges the point of jurisdiction. He also contends that the Judge has omitted to try the plaintiff's vendor's title.

The case, as it now stands, is a dispute about title between two ryots claiming to hold under the same zemindar. The zemindar is satisfied with the judgment of the Lower Court and retires from the *contention*; and we hold that, though it was competent to him to object to the jurisdiction of the Civil Court, it is not competent to the ryot to do so. The zemindar being no longer in contention with the plaintiff, the case involves, as already said, a question of title between two ryots, and, as such, we cannot say, that is not a matter to be tried by the Civil Court.

On the other objection we find that the actual boundary as given in the plaintiff's pottah, includes the land in dispute; and if the land in dispute has formed since the plaintiff acquired the pottah, they are lands between his pottah and the khal, and in right belong to him.

There is no validity in the objections taken, and we dismiss the special appeal with costs.

The 10th February 1865.

Present:

The Hon'ble C. Steer and E. Jackson, *Judges.*

Enhanced rent—Mokururee Pottah—Former rent.

Case No. 2455 of 1864 under Act X of 1859.

Special Appeal from a decision passed by Mr. A. Pigou, Judge of Hooghly, dated the 19th May 1864, affirming a decision

passed by Mr. J. Johnson, Additional Deputy Collector of that District, dated the 25th November 1863.

Kashee Chunder Chowdhry (Plaintiff), *Appellant,*

versus

Kartic Chunder Paul (Defendant), *Respondent.*

Baboo Nil Madhub Bose for Appellant.

Baboos Mohendro Lall Seal and *Greesh Chunder Ghose* for Respondent.

In a suit for arrears at an enhanced rate, the defendant having successfully pleaded a mokurureee pottah,—HELD that the plaintiff could not in this suit obtain a decree for the arrears at the mokurureee rate as the defendants had not admitted any arrears.

THIS is a suit for arrears of rent at enhanced rate after service of notice.

The defendant pleaded a mokurureee pottah in lieu of the claim of enhancement.

Both Courts have held the pottah of the defendant to be genuine and dismissed the suit.

Two objections are taken in special appeal: *1st*, That the plaintiff was entitled to a decree for the arrears at the old rates, even if he was not entitled to the enhanced rent he claimed; *2nd;* That the pottah, pleaded by the defendant, is only valid with respect to a moiety of the tenure, as there was another proprietor who held an 8 annas share in the estate.

The second objection we cannot allow, as it was not urged before the Judge; and we cannot, therefore, say the Judge was wrong in law in not taking up the point.

In regard to the first objection, we think the plaintiff might have got a decree for arrears at the mokurureee rate, if the defendants had admitted any arrears. But they do not do so, and the plaintiff must, therefore, be left to claim them in another suit. The special appeal is dismissed with costs.

The 10th February 1865.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Rent—Kubooleut—Tender of Pottah.

Case No. 1471 of 1864 under Act X of 1859.

Special Appeal from a decision passed by Mr. C. S. Belli, Judge of Rajshahye, dated the 30th March 1864, *affirming a decision of Moulvie Musheeutoolla, Moonsiff of Shazadpoor, exercising the powers of a Deputy Collector, dated the 28th December* 1863.

Pertab Chunder Banerjee (Plaintiff), *Appellant,*

versus

Mr. Clement John Phillippeé (Defendant), *Respondent.*

Baboos Chunder Madhub Ghose and *Sreenath Banerjee* for Appellant.

Baboos Onooocool Chunder Mookerjee and *Kales Mohun Doss* for Respondent.

Until a landlord sues a ryot for a kubooleut, he can only recover whatever rent the ryot is willing to pay. But before the zemindar can sue for kubooleut he must tender a pottah to the ryot.

THIS was a suit for rent. The Judge found that until the plaintiff sued the defendant for a kubooleut, and the rent payable be definitely determined, the plaintiff can only recover from the defendant what the latter is willing to pay. The decree passed for Rupees 27 with costs in proportion; excess costs payable by plaintiff.

In special appeal by plaintiff it is contended that, with reference to the terms of the compromise entered into by the parties, the plaintiff was entitled to recover the rent claimed, and that the suit was in proper form; and further that the Judge has misconstrued the terms of the compromise.

It appears that disputes arose between the parties in 1267, which were settled by a compromise. One of the Clauses of this instrument is to this effect, that plaintiff was to give defendant a pottah, and defendant to execute a kubooleut for land in Chuk Kodai at the rate of 8 rupees per pakee. A measurement was to be made by the general attornies of both parties, and the land was to be assessed at 8 rupees per pakee. It was provided that, if the general attorney of the defendant did not attend the measurement, the general attorney of the plaintiff was to complete the measurement, and that the defendant would pay, without excuse, 8 rupees per pakee for the land measured by the plaintiff's attorney

The plaintiff contends that his attorney measured the land; that defendant, though called upon, did not attend, and that, consequently, according to the terms of the compromise, the defendant is liable.

We think that the Judge is right. The area of the land is in dispute. The defendant has measured it, and finds it to be 66 beegahs 5½ cottahs, whereas plaintiff's mea-

surement shews it to be 331 beegahs 19 cottahs. The terms of the compromise contemplate an exchange of pottah and kubooleut. The plaintiff has not performed his part of the contract; he has not tendered a pottah to the defendant. His remedy is by suit for a kubooleut after tender of pottah under Section 9 Act X. If the parties come to terms, well and good; if not, the jumma payable and upon what area will be determined in the suit for a kubooleut, the rate has clearly been fixed by the parties, and is not disputed.

We dismiss this appeal, with costs and interest.

The 10th February 1865.

Present:

The Hon'ble C. B. Trevor and A. G. Macpherson, *Judges.*

Estoppel—Decree in an Act X case.

Case No. 2003 of 1864.

Special Appeal from a decision passed by Mr. F. L. Beaufort, Judge of the 24-Pergunnahs, dated the 27th June 1864, affirming a decision of Baboo Greesh Chunder Ghose Rai Bahadoor, Principal Sudder Ameen of that District, dated the 7th December 1863.

Koylash Chunder Ghose (Defendant), *Appellant,*

versus

Khettermonee Dossee (Plaintiff), *Respondent.*

Messrs. G. C. Paul and *A. F. Lingham*, and *Baboo Aushotoosh Dhur* for Appellant.

Baboos Unnodapershad Banerjee and *Dwarkanauth Mitter* for Respondent.

The defendant agreed to account to the plaintiff for her half share of the profits of a joint ijara after deducting half the rent of certain *ticca* lands (included in the lease) held by her, or, on default, to pay her annually 1,500 Rupees (without any deduction on account of the *ticca* lands) as her share of the profits. The defendant failed to account as agreed, but sued plaintiff under Act X of 1859, and recovered from her the rent of the *ticca* lands. The plaintiff then sued for her share of the profits calculated at 1,500 Rupees, and also to recover the amount with costs decreed against her in the Act X case. HELD that she was estopped by the decree in the rent-suit.

THE appellant is the defendant in this suit. The facts of the case, as found by the Lower Appellate Court, and so far as it is necessary now to recapitulate them, are as follow:—The appellant and his brother Sreenath had a joint ijara from Government of a certain estate from 1251 to 1270. In 1267 Sreenath died, leaving the respondent his widow and representative. The Government, thereupon, granted a renewal of the ijara (for the unexpired portion of it) in the sole name of the appellant, on his undertaking to pay half the profits derived from it to the respondent; and the appellant executed an *ekrar* and *kubooleut* in favor of the Collector, by which he undertook the whole liabilities of the ijara for the remaining period of the lease, and engaged to pay half the profits to the respondent. He subsequently, on the 25th Bhadr 1269, executed an *ekrar* in favor of the respondent, wherein, after reciting the above facts, he agreed to pay to her (in accordance with the *ekrar* given by him to the Collector) during the month of Assin, then next, her half share of the profits for 1268, after his accounts had been examined and passed by five persons named, and after deducting half the rent of certain *ticca* lands (included in the lease) of which the respondent held possession. He further agreed to pay her in like manner her share of profits for 1269 and 1270 and bound himself, in case of failure to fulfil his engagements, to pay her annually a sum of Rupees 1,500 without making any deduction therefrom on account of the *ticca* lands, as her share of the profits; and he declared that no mismanagement of the ijara, on his part, should affect her claim to the profits. Almost simultaneously with the execution of this *ekrar*, the respondent's mooktear, on her behalf, executed an *ekrar* in favor of the appellant. It is unnecessary, however, to allude further to this *ekrar*, as the Lower Court has found, and we concur in the finding, that it was executed by the mooktear without any authority from the respondent, and consequently is not binding upon her.

The appellant failed to account to the respondent for her share of the profits, in the manner provided for in his *ekrar*, and he sued her under Act X of 1859, and recovered from her the rent of the *ticca* lands held by her. The respondent, thereupon, instituted the present suit to recover her share of profits for 1268 and 1269, taking these profits at the lump sum of Rupees 1,500, as agreed in the *ekrar*: and she sought also to recover the amount with costs of what she had to pay to the appellant under the decree in the Act X case.

The Lower Courts decided in respondent's favor.

In special appeal it is contended that the decree which has been passed, is wrong in

so far as it declares the respondent to be entitled to recover the money paid by her under the decree in the Act X case. It is urged that if the *ekrar* granted by the appellant really formed any bar to his suing for the rents of the *ticca* lands, it ought to have been so pleaded in that suit; and that if it was not so pleaded, or if, being pleaded, the Court still decided in the appellant's favor, the respondent cannot re-open the matter in this suit, but the decree in the Act X case must be deemed to be conclusive.

We think that the appellant is right in his contention; and that if the *ekrar* was a bar to the suit for rent, it ought to have been given effect to in that suit. By the *ekrar*, the appellant undertook to realize what was due from the respondent merely by debiting her with the amount in account; inasmuch as on the face of the *ekrar* very much larger sums necessarily would be due from the appellant to the respondent than from her to him, the appellant practically engaged never to sue her for the rent of these *ticca* lands. The effect of the *ekrar* in fact was to put him out of Court as soon as pleaded; and it appears to us that, on the mere fact of the existence and execution of the *ekrar* being proved, the Court, without going into any question of accounts or of set-off between the parties, should have dismissed the appellant's suit.* We are, therefore, of opinion that the proceeding in the Act X case cannot be disturbed in this suit, and that the decree of the Lower Court must be altered accordingly

It is further contended by the appellant that the Lower Court has erred in not giving him credit for rupees 4,000 being one moiety of rupees 8,000, or Company's Paper to that amount deposited by him with the Collector by way of security. After Sreenath's death, the appellant not having duly paid the Government Revenue, the Collector paid it out of the desposit, and called upon the appellant to give fresh security, which he did. He now claims to be allowed to deduct one-half of the sum so deposited by him, in accounting with the respondent. We think it quite clear that he is entitled to no such deduction. Supposing that the respondent had ever been liable for any part of this money, it could only have been on the footing of its expenditure being one of the necessary expenses of management properly incurred by the appellant, and to be allowed to him in account. The appellant agreed to account at a particular time and in a particular manner, and further agreed that, if he failed so to account, rupees 1,500 (without any details being gone into) should be deemed to be the amount due from him and should be paid by him. The appellant, it is found as a fact, has failed to account as agreed; and consequently he is liable to pay the rupees 1,500 which he contracted to pay in the event which has occurred, and without reference to any question as to how the account may really stand between the parties. He is, therefore, entitled to no allowance whatever, in respect of this claim in this suit. We may add that we can scarcely conceive any state of circumstances under which the respondent would incur any liability in respect of this deposit-money. She was entitled to one-half of the original deposit, which has since been lost through the appellant's neglect to pay what was due to Government: she had nothing to do with making the collections: nothing is said in the *ekrar* about her making or joining in making any deposit with the Collector: and the appellant has expressly agreed to take upon himself the whole liability to Government for the payment of the revenue, and has bound himself that no laches or mismanagement on his part should be allowed to injure the respondent's claim. Without, however, giving any decision on this point, it is sufficient for the purposes of the present appeal, to say that, with reference to the terms of the appellant's *ekrar* and his failure to account as therein agreed, we are of opinion that he cannot, in this suit, claim any deduction, in respect of the deposit of rupees 8,000 in the Collectorate.

The decree must be altered as above indicated, so far as it relates to the sum paid by the respondent under the decree in the suit for rent brought against her by the appellant. In other respects, the decree is confirmed. The parties will respectively bear their own costs of this appeal.

*See Joy Koonwar Dobain's case, 3rd February 1864; Must. Idam's case, 8th April 1863 and 21st July 1864; Lalla Gournarain's case, 18th March 1863.

The 10th February 1865.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Presumption of occupancy from Permanent Settlement—Uniform payment of rent up to date of suit—Refusal of landlord to take rent.

Case No. 2283 of 1864 under Act X of 1859.

Special Appeal from a decision passed by Mr. F. L. Beaufort, Judge of the 24-Pergunnahs, dated the 6th August 1864, reversing a decision passed by Mr. C. R. Garrett, Deputy Collector of that District, dated the 19th May 1864.

Gya Ram Dutt, on behalf of Tara Soonduree Debia (Plaintiff), *Appellant*,

versus

Gooroo Churn Chatterjee (Defendant), *Respondent.*

Baboos Kalee Mohun Dass and *Romesh Chunder Mitter* for Appellant.

Baboos Chunder Madhub Ghose and *Opprokash Chunder Mookerjee* for Respondent.

Proof of uniform payment of rent up to the date of suit is not absolutely necessary to entitle a ryot to the benefit of the presumption under Section 4 Act X of 1859, in a case where the landlord refuses to take rent for a few years before suit.

THIS was a suit for a kubooleut at enhanced rates of rent, on the ground that the value of the land had increased, and that the tenants of the neighbouring holdings paid a higher rate.

The defence was payment at a uniform rate of rent for 20 years, and, therefore, a right to hold at the same rate, under the presumption raised by Section 4 Act X of 1859.

The ryot (who is the special respondent before us) further stated that from the year 1265, to which date his dakhilahs extended, the landlord (special appellant in this case) had refused to take rent from him.

The Judge held that the defendant had proved payment of an unvarying rate of rent for 20 years from the year 1245 to the year 1265, and that he was therefore entitled to the benefit of the presumption that he had held, as he stated, at those rates since the Decennial Settlement.

It is urged, in special appeal, that to take advantage of this presumption, the special respondent ought to have proved uniform payment of rent up to the date of suit, and that the Judge ought to have taken into consideration the defendant's own admissions in another and analogous suit in which he admitted having paid rent up to the year 1268, and the receipts for those years which showed payment at a varying rate of rent.

The first objection is supported by a precedent of this Court dated the 12th August 1862. But this cannot manifestly apply to cases like the present, otherwise a landlord, by refusing to take rent for a year or two before bringing his suit, might at once deprive any ryot of the benefit given to him by the Regulation.

With regard to the second objection, there must, we think, be a remand. We have gone over the record, and find that, in a previous suit between the present special appellant's co-sharer and the special respondent, the latter, in his written statement, alleges that he had paid rent up to the year 1268 B. S. He also filed a list of his documents in which was an entry of dakhilahs for the year 1266, 1267, and 1268, at varying rates of rent. At the first hearing of this appeal, considerable doubt was thrown by the opposing side upon the authenticity of the copy filed, to clear up which we sent for the original.

On inspecting it, we find that the sums set down as rent against the years 1266, 1267, and 1268, are unmistakeably interpolations; and the point still remains doubtful whether these original receipts showed a varying rent or not, or whether any receipts were filed at all.

We observe further that, when this objection was first started, the ryot was not called upon to produce the receipts, or to prove his statement that he had paid the entire amount due on his holding for the years in question to the other 8 annas shareholder, under the impression that, by doing so, he was acquitting his entire debt to the estate.

Taking all the circumstances of the case into consideration, there remains so much doubt in our minds that we are compelled to direct further enquiry.

This enquiry should be directed to the following points:—

The ryot alleges that he paid no rent to the special appellant since the year 1265, because he (special appellant) refused to take it; but that he paid the whole amount due as rent on the whole 16 annas of the estate to the other shareholder. He should be called upon to prove this by the production of his dakhilahs. The co-sharer should also be examined as to the alleged payment; and the ryot should be allowed an opportunity of explaining the discrepancy between his written statement in the former case, and his allegation in this that he paid no rent after the year 1265 B. S.

The special respondent's allegation should also be enquired into, touching the special appellant having, since this suit was instituted, sued him for the rent of the years 1266, 1267, and 1268, at the old rates of rent

and having obtained a decree. This statement is not to be found on the record; but as the special respondent, who was in Court when this appeal was heard, declares that such is the fact, we cannot, in the interests of justice, ignore the plea, though we are sitting in special appeal, for, if the allegation be true, it at once disposes of the landlord's case, and raises the presumption of Act X in the ryot's favor.

The Judge will take up and decide these points.

Costs will follow the result.

The 11th February 1865.

Present:

The Hon'ble G. Campbell and F. A. Glover, *Judges.*

Enhancement—Ryots' receipts (for 20 consecutive years before date of suit not necessary)—Presumption of occupancy from Permanent Settlement—Difference of Currency—Lakheraj.

Case No. 2967 of 1864 under Act X of 1859.

Special Appeal from a decision passed by the Judge of East Burdwan, dated the 19th April 1864, affirming a decision passed by the Deputy Collector of that District, dated the 31st July 1863.

Kattyani Debea (Defendant), *Appellant,*

versus

Soonduree Debea (Plaintiff), *Respondent.*

Baboo Bama Churn Banerjee for Appellant.

Baboo Greesh Chunder Ghose for Respondent.

A ryot's receipts should not be rejected when the arey not denied, merely because he has not called the zemindar's agent to attest them.

It is not absolutely necessary that receipts should be for 20 consecutive years, before the date of suit, to entitle the ryot to the benefit of the presumption under Section 4, Act X of 1859.

A difference of currency is not a variation of rent rebutting such presumption.

A claim to lakheraj should not be thrown out merely because the lakheraj taidad contains no boundaries.

This was a suit for enhancement of rent after notice.

The plaintiff's allegation was that the tenant (special appellant before us) held 6 beegahs 2 cottahs of land at a rent of 5 Rupees 5 annas 16 gundahs; that this rent was not a fair one, regard being had to the rates prevalent in the neighbourhood; and that the proper rent was Rupees 15.

The ryot replied, that he held 3½ beegahs of land only of the special respondent, and that he had held that for generations. He filed receipts to prove 20 years' payment of rent at a uniform rate of Sicca Rupees 5, or Rupees 5-5-16, and claimed the benefit of the presumption arising under Section 4 of Act X of 1859.

The rest of his holding, he stated, was partly his own lakheraj, and partly land belonging to other parties, and leased temporarily to him.

The Judge held that the receipts filed by defendant were unattested, and were moreover not consecutive, and could not, therefore, be accepted as proof of uniform payment of rent for 20 years. The lakheraj he considered not proved, the taidad filed by the ryot containing no boundaries whereby it could be identified with the defendant's holding. The land alleged to belong to other parties, the Judge held to belong to the defendant himself.

He decreed in favor of the plaintiff, upholding the decision of the Court of first instance.

We think that the case must be remanded for further enquiry,—and first as to the receipts. No doubt, they have not been attested; but this appears to us to have been the fault of the Court of first instance. The landlord's agent was examined by the Deputy Collector, and it was admitted throughout, that the special appellant held the land at the rate of Rupees 5-5-16; the landlord never asserted that he had paid a varying rate, nor did his agent, when his deposition was taken; the point in dispute was that that rent was no longer a fair one. Now, it is manifest that, had the Deputy Collector chosen, the question of the genuineness of the dakhilahs might have been put in issue at once by asking the agent regarding them. And it seems to us an extremely hard measure to throw out the ryot's defence, when the dakhilahs he files are nowhere denied, merely because he had not himself called the zemindar's agent to attest them. We think, that this agent should be summoned again by the Court of first instance and be required to depose as to their authenticity. The receipts were signed by the agent, and if they were spurious, nothing would have ben easier for the landlord than to have ignored them. And if they be proved to be genuine, they may, we consider, raise the presumption under Section 4 in the special appellant's favor. It is not absolutely necessary that dakhilahs

should be for 20 consecutive years before the date of suit, for it might frequently happen that parties with every right to the presumption might lose one or two dakhilahs here and there during such a long period, and it would be manifestly unjust to deprive them of the benefit allowed by law when no suspicion could arise of misfeasance, merely because one or two of these receipts had been mislaid or lost. In the present case, the missing dakhilahs are for years about the middle of the period, and we do not think that their non-appearance should defeat the special appellant's claim to the presumption.

The half-anna difference in the rate, as mentioned in the dakhilahs and as collected by the landlord, is easily explained by the difference in the bhatta between Sicca and Company's rupees. The point is noticed by the Deputy Collector; but, in our opinion, it is utterly untenable.

With regard to the so-called "lakheraj" land, our attention has been called to the Full Bench decision of this Court, dated June 1st 1863, (Marshall's Reports, page 525). It was held in that case that the Deputy Collector was not competent to try the validity of an alleged rent-free tenure set up in bar of a claim for enhancement. But, in the present suit, the existence of lakheraj has not been proved. The Judge has thrown out the special appellant's claim on the ground that the lakheraj taidad contains no boundaries. This, we think, was a very summary and unsatisfactory way of treating the case. He should have looked to both sides of the question, and have decided on the evidence adduced, whether there was any part of the speical appellant's tenure hitherto held as lakheraj, valid or invalid; if such were found to be the case, the Full Bench precedent would, doubtless, apply. But both parties are entitled to a tangible decision on the point.

The case will go back to the Court of first instance, to try, 1*st*, whether the receipts are genuine and the uniform payment for 20 years and consequent presumption under Section IV established; and 2*ndly*, whether the ryot holds any lands as a *de facto* lakheraj.

Costs will follow the result.

The 11th February 1865.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice* and F. B. Kemp, *Judge.*

Sale of tenure under Section 105 Act X of 1859—Effect of as regards under-tenures —Proof of fraudulent and collusive sale.

Case No. 45 of 1864.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Hooghly, dated the 1st February 1864.

Messrs. John Borradaile and Co. (Plaintiffs), *Appellants,*

versus

Mr. A. C. Gregory and others, (Defendants), *Respondents.*

Messrs. R. V. Doyne, G. C. Paul and *A. F. Lingham* for Appellants.

Mr. R. E. Twidale and *Baboo Romanath Bose* for Respondents.

A, having obtained a decree against B for the rent of land held under a mourosee pottah, caused the tenure to be sold under Section 105 Act X of 1859. D, as heir of C, alleging that the mourosee tenure was vested in him and not in B, intervened unsuccessfully; and afterwards brought a suit to set aside the sale, which was dismissed as barred by limitation. The purchaser then sued for enhancement of rent against E, a tenant whom he found in posse sion, and who alleged that he held a portion of the land at a fixed rent under a se-mourosee pottah granted by a mouroseedar who was C's predecessor in estate.

In a suit in the Court by E to restrain these proceedings of the purchaser, and to establish the validity of the se-mourosee pottah,—HELD that E, who was no party to the former proceedings was not bound by them; and that, in order to show that his own estate was not destroyed by the sale, he was at liberty to show if he could, that the decree had been obtained by fraud and collusion against a person who had either no interest in the premises, or whose interest had ceased by assignment to A before the commencement of his suit for rent.

Suit laid at Rupees 9,729-13 annas.

THE appellants claim as purchasers of the interests of Macolm and Co., representing Cohn, Feilmann and Co., in 14 beegahs 18 cottahs and 6 chittacks of land at Howrah, under a se-moursee pottah granted on the 20th of June 1853 to Malcolm and Co. by one Kaligeeree Gossain.

The title of the respondent, Bhoobun Mohun Banerjee, to the property is as purchaser at a sale of the tenure in execution of a decree for arrears of rent under Act X of 1859, at the suit of the respondent A. C. Gregory, against Hulodhur Chowdhry.

Mr. B. Barber, now represented by A. C. Gregory, formerly held 27 beegahs 17 cottahs and 2 chittacks of land at Howrah, under a mourosee mokururee pottah. In 1840, Barber sub-let the same to Hulodhur Chowdhry at a yearly rent of Company's Rupees 475-5 annas to hold from generation to generation by raising thereon buildings, carrying on all sorts of trade, preparing gardens, and excavating tanks.

The appellants allege that, on the 5th of July 1844, Hulodhur Chowdhry, after having erected a wall round the land and built houses upon it, sold his interest to Raj Chunder Soor by a kubalah duly registered for Rupees 2,821; that in 1846 Raj Chunder Soor sold the land and buildings to Huropershad Ghose as servant and in trust for Kaligeeree Gossain who paid the purchase-money, rupees 1,801 (Kaligeeree Gossain is now dead and is represented by his heirs Belasgeeree Gossain and Amrasgeeree Gossain) that, on the 26th of June 1855, Kaligeeree Gossain granted a se-mourosee pottah of 14 beegahs 18 cottahs and 6 chittacks, parcel of the said 27 beegahs 17 cottahs and 2 chittacks, at the annual rent of Rupees 372-15-6, to Malcolm and Co., who enlarged the buildings and erected a manufactory thereon; that Kaligeeree Gossain, from the date of his purchase in 1848, regularly paid rents to the mouroseedar till his death in 1856; that, on the death of Kaligeeree, the lands were attached by Government for want of an heir, when Mr. Gregory put in a claim for the tenure, which was opposed by Belasgeeree Gossain who claimed as heir of Kaligeeree; and on the 28th of May 1857, the attachment by the Government was withdrawn without adjudication of the rights of the parties; that Mr. Gregory recognized the tenure of Kaligeeree Gossain in certain suits, and in a notice addressed to the tenants of the property; and he also acknowledged Messrs. Malcolm and Co., by suing them under Regulation VII of 1799, Section 15, Clause 6, and Messrs. Malcolm and Co. deposited the rent in Court for such party as the Court might deem entitled to it.

It is further alleged that, on the 13th of June 1860, Gregory, for a nominal consideration, purchased the rights of Hulodhur Chowdhry in the land; that, after the date of the purchase, he fraudulently sued Hulodhur Chowdhry in two several suits, No. 138 of 1860 for Rupees 502, and No. 194 for Rupees 165-9 annas, arrears of rent of the land, in the Court of the Deputy Collector of Howrah, and obtaned *ex-parte* decrees against Hulodhur Chowdhry; that Belasgeeree Gossain, having become acquainted with the suit No. 194, for Rupees 165, deposited that sum with costs in Court; that Mr. Gregory refused to allow the decree to be satisfied, and under Act X of 1859, Section 105, Mr. Gregory put up and sold the whole of the right and title which Hulodhar Chowdhry had in the 27 beegahs of land, notwithstanding the opposition of Belasgeeree Gossain; that Bhoobun Mohun Banerjee became the purchaser for Rupees 6,000, and obtained a certificate dated the 6th of November 1860; that, when Hulodhur Chowdhry applied to the Collector for the surplus proceeds of the sale, Gregory intervened, and having brought a suit for that purpose, established his right to the surplus proceeds of the sale and got possession of them. The plaintiffs charge that the sale before the Collector was made in a fraudulent and collusive way, and that Cohn, Feilmann, and Co. had no notice of it. Bhoobun Mohun Banerjee then sued Cohn, Feilmann, and Co. in the Collectorate of Howrah without having tendered a pottah for a kubooleut at the rate of Rupees 4,800 a year. Belasgeeree Gossain intervened as claimant. The Deputy Collector, finding that Hulodhur Chowdhry had no right in the premises to be transferred to the purchaser, Bhoobun Mohun Banerjee, dismissed the suit without adjudication on the rights of Belasgeeree Gossain. Bhobun Mohun Banerjee appealed to the Judge, but did not make Belasgeeree a respondent.

The defendants contended before the Judge that Hulodhur Chowdhry had ceased to have any thing to do with the land since 1844, and alleged their own title as above stated.

The Judge in his decision of 24th April 1861, held that the question of the title of Bhoobun Mohun as purchaser at the sale in execution could not be questioned in that suit, inasmuch as Belasgeeree Gossain, the representative of Kaleegeeree Gossain, had appeared as an opponent, and his objections were rejected by the Deputy Collector, and since that time the plaintiff had been in possession, but he left it to Belasgeeree, or any one claiming under him, to impugn Bhoobun Mohun's title in a civil suit. He held that the defendants were bound to take notice of the change and to recognize the legal title which had set aside that of Kaleegeeree. That question of title could not be considered in that suit. He said that the defendants were mere ryots, whom Bhoobun Mohun found established in his estate, and as no evidence was given as to what the amount of the rent ought to be, he decreed a kubooleut at the old rent.

Now, with reference to this decision for the mere purpose of determining the question, which of the two, Kaligeeree or Bhoobun Mohun, should be the person to whom for the future, Malcolm and Co. and their assignees were to pay the rent, the decision, rejecting Belasgeeree's claim in the execution department, was properly held as binding on all parties, until reversed. But it is a monstrous proposition that the Judge could pronounce the se-mourosee pottah of the defendants void as against Bhoobun Mohun, the purchaser at that sale, without hearing the defendants who were no parties to that suit or the execution proceedings, and, therefore, so far as their own interests were concerned, not in any manner bound by the former decision.

Having arrived at the conclusion (which was, no doubt, right,) that Malcolm and Co. were bound to pay the old rent to Bhoobun Mohun, the Judge failed to see how great was the defect in the reasoning by which he arrived at that conclusion. We observe, too, that he pronounces a decision affecting Belasgeeree's interest in his absence though he had intervened in the Lower Court. From this decision a special appeal was presented to the Sudder Court. Mr. Allan, for Messrs. Cohn, Feilmann, and Co., prayed that it might be determined at what rate a kubooleut should be granted, and the suit was remanded for that purpose.

We feel it difficult to agree with the opinion expressed by the Sudder Court in that case; but we are not sure that they amount to more than this, that the Revenue Court would take the title for granted, leaving it to be contested in the Civil Court. The Judge, upon the remand, gave to Bhoobun Mohun the rent demanded by him, *viz.*, Rupees 4,800, without assigning any reasons except that defendants had no right of occupancy under Section 8 of Act X of 1859.

On the 31st of December 1861, Belasgeeree instituted a suit against Bhoobun Mohun to set aside the sale to him, but as the suit was not instituted within one year, it was dismissed with costs.

The plaintiffs in a regular suit now pray to have it declared that they have an absolute right to the mourosee tenure of the lands with the buildings thereon at a fixed rate of rent, *viz.*, 372-15-6 per annum; that the purchase of Bhoobun Mohun gave him no right in the property: that he has no right to claim rent from the plaintiffs; that he and his heirs may be perpetually restrained by the order and injunction of the Court from taking any further steps in the proceedings under Act X of 1859, or such other relief as the nature of the case may justify.

The Principal Sudder Ameen of Hooghly, after a puerile complaint of the length and argumentativeness of the plaint, dismissed the suit without going into the evidence.

We see with great pain and regret that the Lower Courts, one after another, with the honorable exception of the Deputy Collector of Howrah, Mr. E. J. Lingham, appear to have endavoured to avoid grappling with the facts of this which has now become a most complicated and intricate case, although the practical result of such neglect has been to allow Mr. Gregory, by means of what are alleged to be a series of frauds, to get possession of property which has been increased at least twenty-fold, as against tenants whose capital expended by them while holding the land under what they believed to be a *bonâ fide* perpetual lease, has created its value; and that the several Courts have literally refused to listen to these tenants while defending so righteous a title.

The first allegation with which we propose to deal, is the statement that, prior to the sale under the decree on the 10th of June 1860, Mr. Gregory, purchased the rights of Hulodhur Chowdhry in the lands. Now, it would seem that if this is true, the tenure could not afterwards be sold in execution of a decree by Mr. Gregory against Hulodhur Chowdhry under Section 105 of Act X. No doubt, as between the purchaser at that sale and Mr. Gregory, Mr. Gregory may be estopped from setting up that he had a title under this purchase in himself; and, consequently, the purchasers are able to make a title under the sale as against him. But it will be a question whether that title will not be subject to all the infirmities of Gregory's title, and probably must stand upon the title of Hulodhur as vendor. If so, the effect may be this; as against honest purchasers, such as the Messrs. Malcolm and their representatives, who may be assumed to be without notice of the frauds alleged to have been practised. Hulodhur could not deny the assignments by himself to Raj Chunder; and as Hulodhur must be estopped, so Gregory and Bhoobun Mohun, who, in the circumstances above indicated, will probably be found to be standing in the position of a sub-purchaser under Gregory, will probably be bound by the same estoppel.

Secondly, it must be tried whether Hulodhur Chowdhry had or had not any interest in the premises included under his original dur-mourosee pottah at the time of the sale, and for that purpose it must be ascertained whether Raj Chunder, Kaligeeree, and Huro Pershad had been registered in the books of Mr. Barber or his successors in estate, or whether they or either of them, after notice of the assignment, had been accepted as tenants by Mr. Barber or his successor in estate; and if it turns out that there has been no registration, the issue will arise, whether, the assignments having been before Act X of 1859, registration was necessary to perfect that title of the assignee.

The title of the defendant, Bhoobun Mohun, as purchaser under a decree against Hulodhur, must stand or fall with the decree; and the present plaintiffs, who were no parties to that decree, may shew that it was obtained by fraud and collusion, and for the purpose of defeating their rights.

For these purposes the case must be remanded for trial.

The 11th February 1865.

Present:

The Hon'ble A. G. Macpherson and F. A. Glover, *Judges.*

Abatement of rent—Howaladars.

Case No. 467 of 1864.

Application for review of judgment passed by Justices A. G. Macpherson and F. A. Glover in Special Appeal No. 2096 of 1864, dated the 12th May 1864.

Komlakant Doss and others *Petitioners*,

versus

J. G. N. Pogose and others, *Opposite party.*

Baboo Prosunno Koomar Sein for Petitioners.

Mr. C. Gregory for Opposite party.

A howaladar has a right to sue for abatement of rent.

ACCORDING to the decision of the Full Bench in the case of Horokishen Banerjee *versus* Joy Kishen Mookerjee (1, Sutherland's Reports, page 299), a putneedar has a right to sue for abatement.

Following that decision, we think we must hold that, in this case the howaladar has a similar right. We, therefore, reverse our former judgment, and confirm the decree of the Lower Appellate Court with costs.

The 14th February 1865.

Present :

The Hon'ble J. P. Norman and Shumboonath Pundit, *Judges.*

Notice of Enhancement—Power of Deputy Collector to issue.

Case No. 2758 of 1864 under Act X of 1859.

Special Appeal from a decision passed by Mr. O. Toogood, Judge of Burdwan, dated the 22nd June 1864, reversing a decision passed by the Deputy Collector of that District, dated the 29th February 1864.

Cazee Syed Nasir Ally (Plaintiff), *Appellant,*

versus

Sheikh Neaz and others (Defendants), *Respondents.*

Baboo Bama Churn Banerjee for Appellant.

Mr. A. F. Lingham for Respondents.

A Deputy Collector has authority to issue a notice of enhancement under Section 13 Act X of 1859.

THIS is a suit for enhancement. The Judge dismissed the suit on the ground that the notice under Section 13 was issued by the Deputy Collector, who had no jurisdiction to take up the case without an order to that effect. The plaintiff appeals.

We find that the application for the order was made to the Collectorate : and though the order appears to have been passed by Radhanath Gangooly, the Deputy Collector, all the subsequent proceedings took place in the Collectorate. We think that it was not a question of jurisdiction, and that it must be assumed that the Deputy Collector had authority to pass this which was a mere ministerial order; and we, therefore, remand the case for trial on the merits.

The 14th February 1865.

Present :

The Hon'ble C. Steer and E. Jackson, *Judges.*

Istemrree tenure (Speciality of)—Suit for Kubooleut at enhanced rates (Notice of enhancement not necessary).

Case No. 3217 of 1864 under Act X of 1859.

Special Appeal from a decision passed by Mr. G. G. Balfour, Judge of Chittagong, dated the 15th September 1864, reversing a decision of the Deputy Collector of that District, dated the 20th February 1864.

Mahomed Sechee (Plaintiff), *Appellant,*

versus

Kummur Ally and others (Defendants), *Respondents.*

Baboos Sreenath Doss and *Bhuggobutty Churn Ghose* for Appellant.

Baboo Mutty Lall Mookerjee for Respondent.

Quære.—Whether an *istemraree* lease is a perpetual or a life-lease, or whether it bars enhancement or not.

Issue of previous notice of enhancement is not necessary to maintain a suit for a kubooleut at enhanced rents.

THIS was a suit for a kubooleut. The defendant answered that he already held two pottahs and had given kubooleut for his tenure which was *istemraree*. It does not appear very clearly what is the speciality of an istemraree tenure, whether it bars enhancement or not!

The first Court set aside these pottahs as having already been declared in a former suit to be spurious, and decreed enhancement.

The Judge, on appeal, was of opinion that no binding decision as respects these pottahs was passed in the former litigation; but he considered from other evidence that the defendant holds an istemraree tenure. He goes on to say that, therefore, the suit of the plaintiff for a kubooleut at a higher rate of rent is bad without issue of notice, and that it is not necessary to enter into the

question whether the plaintiff is entitled or not to enhancement.

It is, on special appeal, contended that the former decision did rule that the pottahs were not genuine. But we agree with the Judge that all that was there held was that the pottahs were not proved, and they certainly had not been put in issue. It was then contended that the Judge should have gone on to determine whether these pottahs were genuine or not, and whether the plaintiff was entitled to enhancement or not? The Judge is wrong in saying that the plaintiff did not sue for enhanced rates. The Judge should go on to try whether the pottahs are genuine, and whether the defendant holds a tenure liable to enhancement or not. In a suit for a kubooleut at enhanced rates, it has been frequently held that it is not necessary to shew that previous notice for enhancement was issued.

The case is remanded in order that the Judge may decide whether the rent can be enhanced or not; and if it can, then what rent plaintiff is entitled to on the ground on which he has sought to raise it.

The 14th February 1865.

Present:

The Hon'ble J. P. Norman and Shumbhoonath Pundit, *Judges.*

Appeal (to Judge from decision of Deputy Collector)—By whom to be presented.

Case No. 2703 of 1864 under Act X of 1859.

Special Appeal from a decision passed by Mr. A. A. Swinton, Judge of Tipperah, dated the 21st June 1864, rejecting an appeal from a decision passed by Mr. L. Barber, Deputy Collector of that District, dated the 22nd March 1864.

Zeenuth Ali and others (Defendants), *Appellants,*

versus

Mahomed Ali (Plaintiff), *Respondent.*

Baboos Greeja Sunker Mozoomdar and *Bama Chunder Banerjee* for Appellants.

Mr. A. F. Lingham and *Baboo Romesh Chunder Mitter* for Respondent.

An appeal to the Judge from a decision of the Deputy Collector in a suit under Act X of 1859 must be presented by the appellant in person or by a pleader, and not by a mooktear.

In this case an appeal was presented to the Judge from a decision of the Deputy Collector in a rent-suit under Act X of 1859.

The petition of appeal was signed by Sumad Ally and others, mookteans, who wrote the names of the appellants, adding the words by the pen of Sumad Ally, &c.

At the hearing the Judge rejected the appeal on the ground that, as the appellants were residing within the jurisdiction, an appeal could not be presented otherwise than in person or by a vakeel. Section 35 of Act X of 1859 empowers a plaintiff to institute a suit in the Collector's Court in person or by a mooktear, and Section 71 empowers any party to a suit in the Collector's Court to conduct it by a mooktear. Appeals to the Judge's Courts are regulated by Section 16 of Act VIII of 1859; and as under that enactment no application can be made to the Court by any party within the jurisdiction of the Court, otherwise than in person or by a pleader, the presentation of the appeal by a mooktear was irregular; and as the respondent had done nothing to waive the objection which he seems to have taken by his pleader on the hearing of the appeal, we think that the Judge was authorized to strike out the appeal. We, therefore, dismiss this appeal with costs and interest.

The 15th February 1865.

Present:

The Hon'ble C. Steer and E. Jackson, *Judges.*

Suit against ryot by tenant of lapsed ijaradar ejected by due course of law.

Case No. 2582 of 1864 under Act X of 1859.

Special Appeal from a decision passed by Mr. F. C. Fowle, Judge of Rungpore, dated the 22nd June 1864, reversing a decision of the Deputy Collector of that District, dated the 29th February 1864.

Ram Narain Singh and another (Plaintiffs), *Appellants,*

versus

Hurreeprea Chowdhrain and others (Defendants), *Respondents*

Baboo Tarucknath Sein for Appellant.

Baboos Sreenath Doss and *Kishen Dyal Roy* for Respondents.

Suit against a ryot by the tenant of an ijaradar whose rights had lapsed, and who had been ejected by due course of law. HELD that, in such a case, neither

the plaintiff nor the ijaradar could be considered under Section 77 Act X of 1859, to have been *bonâ fide* in the receipt and enjoyment of the rents.

THIS was a suit for rent brought by the under-tenant of an ijaradar against a ryot. The zemindar alleges that the plaintiff has no title to the rents; that the plaintiff holds under a jote from an ijaradar, whose ijarah rights have lapsed. The Judge has found this to be correct, and has dismissed the plaintiff's claim.

It is said on special appeal that the question should have been decided under Section 77 of Act X, and the Judge should not have enquired into the title of the plaintiff, but ascertained whether the zemindar had been in the *bonâ fide* receipt and enjoyment of the rents. There is no doubt that in this case the third party, the zemindar, is in *bonâ fide* receipt of the rents of the village; the ijaradar having been ejected by due course of law. The ijaradar could not under Section 77 of Act X, be allowed to go on collecting the rents notwithstanding his ejection, although it might be said that under Section 77 he would be entitled to a decree. Similarly, the plaintiff in this case, being in law ousted at the same time as the ijaradar, he cannot be allowed to go on collecting his share of the rents. Neither the plaintiff nor the ijaradar can be considered to have been *bonâ fide* in the enjoyment of the rents up to date of suit.

We dismiss this appeal with costs.

The 15th February 1865.

Present:

The Hon'ble C. Steer and E. Jackson, *Judges.*

Interest (on rents withheld).

Case No. 3070 of 1864 under Act X of 1859.

Special Appeal from a decision passed by Mr. S. R. Muspratt, Judge of Purneah, dated the 21st July 1864, *affirming a decision of Mr. N. S. Alexander, Deputy Collector of that District, dated the 11th May* 1864.

Lalla Sheo Sahoy Singh and others (Defendants), *Appellants,*

versus

Kummarun-nissa Begum (Plaintiff), *Respondent.*

Mr. John Baptist for Appellants.

Baboo Unnodapershad Banerjee for Respondent.

Where rents are withheld, the defaulter is liable to pay interest whether provided for or not in the pottah.

THIS is a suit for rent for 1268 and 1269. The defendant pleaded payment of all but a small balance.

The Courts below have decided the plea of payment, and decreed the suit with interest.

The first question raised in special appeal refers to the merits of the decision. The second objection is that, the pottah not being produced, it was impossible to say whether, under the engagement between the parties, interest was claimable or not. We think that where rents are to withheld a defaulter renders himself liable to pay interest whether the pottah says so or not.

It is again objected that the claim for the rent of 1268 is barred under the law, but this is not the case.

We dismiss the special apeal with costs.

The 15th February 1865.

Present:

The Hon'ble C. Steer and E. Jackson, *Judges.*

Presumption of occupancy from Permanant Settlement—Where it arises.

Case No. 3116 of 1864 under Act X of 1859.

Special Appeal from a decision passed by Mr. J. R. Muspratt, Judge of Purneah, dated the 22nd July 1864, reversing a decision of Mr. Wm. Perry, Deputy Collector of that District, dated the 5th May 1864.

Sheikah Ekram (Plaintiff), *Appellant,*

versus

Bebee Buhooran (Defendant), *Respondent.*

Moulvie Aftaboodeen Mahomed for Appellant.

Baboo Romanath Bose for Respondent.

It is only when a ryot claims to hold from the Decennial Settlement that the presumption arising from 20 years' payment of uniform rent can avail him.

THIS was a suit to set aside a notice of enhancement of rent.

The first Court found that the rent had not changed for 20 years, and decreed the suit.

The Judge, on appeal, was not satisfied upon the evidence that it had remained fixed even for 20 years.

The ground of special appeal is, that the evidence does prove that the rent has remained unaltered during that time. Respondent's vakeel, however, points out that the plaintiff does not claim to hold at a fixed rent from the Decennial Settlement. This appears to be correct. There is, therefore, no ground for raising the legal presumption laid down in Section 4 of Act X. It is only when a ryot claims to hold from the Decennial Settlement that the presumption arising from 20 years' unchanged rent can avail him.

We agree in the orders passed by the Judge, though on different grounds, and dismiss this appeal with costs.

The 15th February 1865.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Presumption of occupancy from Permanent Settlement—Suit for enhanced rent.

Case No. 3114 of 1864 under Act X of 1859.

Special Appeal from a decision passed by Mr. G. Bright, Judge of East Burdwan, dated the 12th April 1864, affirming a decision passed by Baboo Rakhal Doss Holdar, Deputy Collector of that District, dated the 2nd June 1863.

Rakhal Doss Bose, Attorney of Anund Moye Dossee (Plaintiff), *Appellant,*

versus

Sheikh Golam Surwur (Defendant), *Respondent.*

Baboo Taruck Nath Dutt for Appellant.

Moulvie Murhumut Hossein for Respondent.

The bringing of a suit by a landlord to recover arrears of rent at enhanced rates under Act X of 1859, cannot annul the former decree of a competent Court declaring the ryot's holding to be liable to enhancement, by entitling the ryot (on proof of payment of uniform rent for 20 years) to claim the benefit of the presumption under Section 4.

THIS was a suit to recover arrears of rent at enhanced rates under Act X of 1859.

The defence was payment of rent at an unvarying rate from the date of the Permanent Settlement.

The Court of first instance held that although the question of "istemraree" has been decided before by the Civil Court adversely to the tenant, still the plaintiff was not entitled to demand enhanced rates.

And the Judge, whilst admittingth at the defendant's holding had been declared not "mokururree," followed the Deputy Collector's opinion, and held that as the plaintiff had allowed his former case to be dismissed on default, and as his present application was made and notice served under the provisions of Act X of 1859, his whole case was governed by that law from the beginning, and that the ryot could, by proof of payment of an unvarying rate of rent for 20 years, get the benefit of the presumption under Section 4; and as he found it proved that he had paid an

unvarying rate for that time, and for long before, he upheld the Deputy Collector's decision, and released the land from enhancement.

We think that there can be no doubt that the Judge was wrong. In the first place there was, at the time this suit was brought, no other law under which plaintiff (special appellant before us) could come into Court, except Act X; and it would be monstrous to say that he was to lose the benefit of the former decision in his favor, or merely because the law, under which that decision was passed, had been abrogated, and a new one passed. For the rest it appears from the record that the special appellant, who is an auction-purchaser under Act I of 1845, sued originally for authority to enhance. In the course of that suit the ryot's "istemraree" pottah was declared on appeal not to give a right to hold at fixed rates, and his case was remanded to the Court of first instance to serve notice, if notice had not already been issued, and to assess the rate of rent demandable. The special appellant declined to deposit the Ameen's fee on the ground apparently that, as he was a purchaser under Act I of 1845, he was entitled to demand rent according to his own pleasure, and that it was unnecessary to send an Ameen to enquire into the rate. On his refusal, his case was dismissed; and on appeal to the Sudder Court, that order was upheld. But the order of the Sudder Court did not interfere with the Lower Court's decision as to the nature of the tenure, which had been already declared not to be istemraree, and the special appellant's right to increase rent remains in full force.

The special respondent contends that, as his landlord has sued under Act X, he also (the tenant) is entitled to all the benefit that law can give him; and that as he has paid an unvarying rate for 20 years, his holding cannot be liable to enhanced rates. The two things appear to us altogether different. The landlord was obliged, as we have before remarked, to sue under Act X; but his having done so cannot do away with the decree of a competent Court which long ago declared the special respondent's holding one the rent of which could be enhanced; and, moreover, the special respondent also in that case stood on his pottah, and cannot now be allowed to shift his ground, and claim exemption on the plea of 20 years' payment of unvarying rate.

We think that the question of right to enhance has been definitively settled, and the special respondent cannot now re-open it. Were his plea to be held good under Act X of 1859, we should be practically reversing the decision of 1858, which we have no right to do.

This case must, therefore, be remanded to the Court of first instance, in order that the rates of rent may be fixed, and an account of the rent demandable made.

All costs will be paid by special respondent.

The 16th February 1865.

Present:

The Hon'ble C. Steer and E. Jackson, *Judges.*

Kubooleuts—Power of Mootawullees to take—from ryots.

Case No. 3194 of 1864 under Act X of 1859.

Special Appeal from a decision passed by Mr. G. Balfour, Judge of Chittagong, dated the 11th August 1864, *reversing a decision passed by Baboo Kalee Pershad Sein, Deputy Collector of that District, dated the 28th December* 1863.

Obhoy Churn Paul and others (Defendants), *Appellants,*

versus

Sadut Ali (Plaintiff) and the remaining (Defendants), *Respondents.*

Baboos Sreenath Dass and *Anund Ram Ghose* for Appellants.

Baboo Kishen Succa Mookerjee for Respondents.

A mootawullee in possession is entitled to make arrangements for endowed lands, and to obtain kubooleuts from the ryots.

THIS was a suit by the mootawullee of certain endowed lands in Chittagong to obtain a kubooleut from a tenant holding a portion of those lands. There are eight other suits for kubooleut against other tenants on the same lands. The Judge has decreed the claim, rejecting the objections of a third party, who apparently is putting forward a title to be joint mootawullee with the plaintiff. The Judge finds that the objector's right to joint in the mootawulleeship has so far been rejected, and that the plaintiff is the mootawullee in possession, and that he is accordingly entitled to make arrangements for the endowed land and obtain kubooleuts from the ryots.

This is objected to in special appeal, but we think the decision correct, and dismiss the appeal with costs.

The 16th February 1865.

Present:

The Hon'ble H. V. Bayley and Shumboonauth Pundit, *Judges.*

Enhancement—Abatement.

Case No. 2771 of 1864 under Act X of 1859.

Special Appeal from a decision passed by Mr. A. A. Swinton, Judge of Tipperah, dated the 29th June 1864, affirming a decision passed by the Deputy Collector of that District, dated the 28th March 1864.

Ramkant Chowdry (Defendant), *Appellant,*

versus

Bindobun Chunder Gopee (Plaintiff), *Respondent.*

Baboo Kishen Succa Mookerjee for Appellant.

Bboo Rama Churn Banerjee for Respondent.

A lease provided for the rent being proportionately increased it, on measurement, the lands were found to exceed the quantity mentioned in the lease. HELD that under this lease the lesse could not claim abatement if, on measurement, the lands were less than the quantity mentioned in the lease.

PLAINTIFF in this case is a purchaser of a howala tenure sold for arrears of rents, and sued his landlord under Section 18 of Act X of 1859 in the Collectorate for abatement on the ground that, on measuring the lands, they were found to be less than the quantity mentioned in the lease by which the tenure was originally created.

Both the Lower Courts, on being satisfied that the lands now held by the plaintiff are actually less than the quantity represented in the original lease, decreed the claim.

The defendant has specially appealed to this Court.

The howala is a permanent tenure, and the plaintiff is in no better situation than the original tenant to whom the lease was first granted. The tenant is bound to abide by the terms of the lease; and if he cannot shew that he has any legal title to claim any abatement, he cannot obtain a decree for it. It is true that all cases for abatement must, under Section 23 of Act X, be brought in the Collectorate. But the plaintiff has no right under Section 18 to abatement, simply because the lands, on measurement, are now found to be less than the quantity represented in the original lease. The terms of the lease are against any such rights. The lease distinctly provides for a proportionately larger amount of rent being imposed, if, on measurement, the lands are found to exceed the quantity mentioned in the lease. The mention of this right of the defendant excludes the right of the tenant to claim any deduction, if the lands are found to be less. The contract was to take the lease on condition of paying so much for the lands, taking them for the purposes of the payment and calculation of rents to be as much as described in the lease with a reservation in favor of the landlord regarding his right to claim an increased rent if he can show that lands more than the quantity so fixed in the lease are actually held by the ryot. In such a state of things, and without showing that the decrease has occurred subsequent to the granting of the lease, or otherwise than by the fault of the lessee, the plaintiff is not entitled to obtain any decree for abatement. We accordingly decree the appeal of the defendant with costs, and dismiss the claim of the plaintiff, and reverse the decision of both the Lower Courts with costs.

The 17th February 1865.

Present:

The Hon'ble H. V. Bayley and Shumboonath Pundit, *Judges.*

Enhancement—notice of—Jurisdiction.

Case No. 2473 of 1864 under Act X of 1859.

Special Appeal from a decision passed by the Judge of Dacca, dated the 2nd June 1864, affirming a decision passed by the Deputy Collector of that District, dated the 20th February 1864.

Mothoora Nath Koondoo (Defendant), *Appellant,*

versus

Mr. R. C. Bell (Plaintiff), *Respondent.*

Baboos Chunder Madhub Ghose and *Sreenath Banerjee* for Appellant.

Baboo Gopal Lall Mitter for Respondent.

A suit for enhancement is liable to be dismissed if brought in Jessore in respect of lands situate in Furreedpore.

Under Section 163 Act X of 1859, a Collector cannot issue a notice of enhancement in respect of lands not situate within his jurisdiction.

IN this case notice of enhancement under Section 13 of Act X of 1859 was served through the Collector of Furreedpore; and the case of the landlord for obtaining a kubooleut for arrears of rent at the enhanced rates demanded by that notice, was tried by the Collector of Jessore. No objection, on the

score of jurisdiction, was taken by the defendant, the special appellant, in the Court of first instance; though he urged the same before the Lower Appellate Court when he appealed against the decree awarded against him. The Lower Appellate Court does not appear to have tried this objection. The respondent urges that the lands are situated within the jurisdiction of the Jessore Court; and it is the contention of the defendant that they lie in Furreedpore, though they form portion of some estate paying revenue in the Collectorate of Jessore. Now, even if the allegation of the plaintiff be correct, his case, as far as it is based upon the notice served by a Collector, who, under Section 163 of Act X of 1859, had no jurisdiction to issue any such notice of enhancement of rent sregarding lands not situated within his jurisdiction, must fall; but, as even, irrespective of the notice, the respondent is entitled to obtain a decree under which he may recover the enhanced rents as may be fixed subsequent to the date of that decree, it is necessary to remand the case, to decide whether the lands are situated in Furreedpore or Jessore. We accordingly remand the case to the Lower Appellate Court to try this issue. If it finds that the lands are *not* situated within Jessore, the plaintiff's case should be dismissed, and if it is found that the lands are situated in Jessore, and so the case was rightly brought there, it should then proceed to act upon the other objection of the appellant, that is, that the notice was issued by a Collector who had no jurisdiction, and decide the case upon the merits.

The 17th February 1865.

Present:

The Hon'ble H. V. Bayley and Shumboonauth Pundit, *Judges.*

Jurisdiction (of Civil Court)—Right to collect rents as a sharer.

Case No. 2588 of 1864.

Special Appeal from a decision passed by Mr. James Reilly, Principal Sudder Ameen of Dinagepore, dated the 17th June 1864, reversing a decision of Baboo Bhyrub Chunder Mitter, Moonsiff of that District, dated the 29th September 1863.

Hurro Chunder Roy (Defendant), *Appellant,*

versus

Obhoy Chunder Sircar and others (Plaintiffs), *Respondents.*

Mr. A. F. Lingham and *Baboo Baneenath Bose* for Appellant.

Baboos Kishen Dyal Roy and *Issur Chunder Chuckerbutty* for Respondents.

The Civil Court has jurisdiction in a suit which involves the right to collect rents as a sharer or representative of or deriving from a sharer, and the decision of which depends on proof of certain alleged partition.

In this case, there are three pleas urged before us:—

1. That the Civil Court had no jurisdiction.

2. That a *copy* of *likum* or *butwara* was not admissible.

3. That the *roka* was not stamped.

The *first* plea, we are clearly of opinion, is untenable. The real contention in this case is of a Civil nature, *i. e.*, the right to collect rents as a sharer, or representative of or deriving from a sharer. The decision of the case depended on proof of a certain alleged partition defining particular shares.

The *second* plea is untenable, for the Lower Appellate Court distinctly states that the special appellant, defendant, "has not disputed them," *i. e.*, copy of the *likun* or *butwara* paper.

On the *third* plea we need only remark that it is not shown to have been urged to the Lower Appellate Court as a point of special appellant's case on which he relied for the affirmation of the first Court's decision.

Under these circumstances, we dismiss this special appeal with costs.

The 18th February 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Enhancement—Ryots holding over after expiry of lease—Summary suits—Notice of enhancemnet under Regulation V of 1812.

Case No. 99 of 1862 under Act X of 1859.

Regular Appeal from a decision passed by Mr. J. G. Howell, Deputy Collector of Tirhoot, dated the 21st December 1861.

Mr. George Tommy (Defendant), *Appellant,*

versus

Soobba Kurim Lall (Plaintiff), *Respondent.*

Mr. R. T. Allan for Appellant.

Baboo Kishen Succa Mookerjee for Respondent.

Suit laid at Rupees 10,500-0-0.

A ryot, who holds over after the expiry of his lease in spite of his landlord, is liable to pay at the rates current for the same kind of lands in the village. The summary suits brought by the landlord, demanding rent at those rates, were held to be sufficient notice of enhancement under Regulation V of 1812.

THE defendant held a lease of the villages of Nurlochunpore, Mooda, and Mohunpore Mooda from the plaintiff. The lease expired in 1254, but the defendant continued to hold possession of a certain quantity of the lands comprised in those villages. Plaintiff brought summary actions to recover rents at the village rates from the defendant, and succeeded in obtaining decrees; but the summary decrees were reversed on technical grounds by suits brought in the Civil Courts, which held that the Collector had acted without jurisdiction in giving decrees for rent in excess of the amount paid in the previous year. Ultimately the plaintiff brought the present action, claiming the rents from 1255 to the ten anna kist of 1258, amounting, with interest, to Rupees 10,500-9, but the suit was dismissed, the Deputy Collector considering that a suit for damages should have been brought in the Civil Court. An appeal was preferred to this Court, on the ground that the case was one cognizable by the Collector under Act X of 1859, and this Court, on 29th June 1861, held that there was no valid reason for refusing to entertain the suit under that Act, and at the same time indicated the points which were to be tried:—*first*, the quantity of land in the occupation of the defendant; and *secondly*, the rate to be paid for it. An Ameen was deputed to ascertain the area in the defendant's possession, and the rates current in the neighbourhood. From his report it appears that of 315 beegahs 15 cottahs, 222 beegahs were cultivated by defendant from 1255 to 1257 in indigo, and in 1258 oats and other crops were grown on the land; 58 beegahs 19 cottahs were sown with indigo by the ryots in 1257, 2 beegahs in sugar-cane, 2 beegahs had thatching grass, and 15 beegahs 10 cottahs were left fallow, and were used for pasturage. The Ameen then gave two sets of rates said to be current in the village and its neighbourhood, one set being considerably higher than the other; and he came to the conclusion that the lower rates were correct and current. The Deputy Collector rejected the rates fixed by the Ameen, and gave plaintiff a decree for the amount claimed by him, and an appeal has now been preferred against that decision.

The question before us, therefore, is simply this, what is the area in the possession of the defendant, and at what rates is he to pay? The area has been ascertained by the Ameen's investigation, and no exception has been taken to it before the Lower Court. We therefore accept that report as correct in regard to the area, *viz.*, 315 beegahs 15 cottahs being in the defendant's possession. With regard to the rates, we find that the plaintiff, in addition to the local investigation, has produced evidence, oral and documentary, to prove that the higher set of rates is current in the village, and we see no ground for differing from the opinion of the Deputy Collector on this point, and we further find that these rates were decreed in all the summary suits brought by plaintiff, and though the decisions themselves were set aside on technical grounds, the rates were not impugned by the Principal Sudder Ameen who disposed of these cases. The defendant states that he is willing to pay at the rate he did when he held the lease, and urges that, as no notice under Regulation V of 1812 was served upon him, that the plaintiff intended to demand higher rates, he cannot be

held liable for higher rent than that he had hitherto paid. As, however, the lease had expired, and the defendant held on in spite of the plaintiff, and would not give up the land in dispute, we think that plaintiff is entitled to recover from him at the rates current for similar lands in the village; and as for notice, we think that the several summary suits brought by plaintiff demanding rent at those rates are a sufficient notice to warrant the Court giving plaintiff a decree for rent at the rate he has demanded. Under this view of the case, we dismiss the appeal with costs.

The 18th February 1865.

Present:

The Hon'ble H. V. Bayley and Shumboonath Pundit, *Judges.*

Presumption of Occupancy from Permanent Settlement—Annulled by temporary lease—Nominal reduction no variation.

Case No. 2567 of 1864 under Act X of 1859.

Special Appeal from a decision passed by Mr. F. C. Fowle, Judge of Rungpore, dated the 10th June 1864, affirming a decision passed by the Deputy Collector of that District, dated the 16th March 1864.

Ramrutno Sircar (Defendant), *Appellant,*

versus

Chunder Mookhee Dabea (Plaintiff), *Respondent.*

Baboo Rajendro Coomar Seal for Appellant.

Baboo Kishen Dyal Roy for Respondent.

A nominal reduction in the jumma of 1 anna and 3 pies, and that too in the ryot's favor, is not a variation that deprives him of the benefit of the presumption created by Section 4 Act X of 1859.

The special plea of having held from before the Decennial Settlement, is not indispensable to entitle the ryot to the benefit of the presumption.

The admission, involved in the acceptance of a 5 years' temporary kubooleut, annuls the presumption above referred to, of a fixed tenure from before the Decennial Settlement.

In this case plaintiff sued to enhance defendant's rent. Plaintiff's case was that defendant did not pay fair and adequate rates for his land; that defendant had given a kubooleut from 1261 to 1265, which showed a variation from his former rent to the extent of one anna and three pies; and that as the period of that kubooleut had expired, and plaintiff had allowed defendant to hold over during the interv done of grace, not now sue to enhan

The defendant' held as a purcha the present time, real variation ab leut and that b the tenure was fendant's predeces

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No appeal from in execution of

Rajah Judoo Bhoosun Deb Roy (Decree-holder), *Appellant,*

versus

Chunder Coomar Roy (Judgment-debtor), *Respondent.*

Baboo Dwarkanath Mitter for Appellant.

Baboos Sreenath Doss nd *Bunghsee Dhur Sein* for Respondent.

From an order passed by a Deputy Collector in execution of a decree for rent, there is no appeal to the Zillah Judge.

THE petitioner has obtained from the Deputy Collector, in execution of a decree for rents against a farmer, an order to oust a person who had purchased at a sale by the Official Assignee, the rights and interests of the aforesaid lease-holder in the said farm. It is said that, previous to the institution of the case by the petitioner, this farmer had become an insolvent, and had made over all his properties to the Assignee, who had seized the property before the sale.

It has already been ruled by a former decision of another Divisional Bench of this Court, dated 9th January 1865 (reported at page 10, part 2, volume II, Weekly Reporter) that, from an order passed by a Deputy Collector in execution of a decree for rents, there is no appeal to the Zillah Judge.

We accordingly reverse with costs the order of the Lower Appellate Court, and decree the appeal with costs.

The 21st February 1865.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Jurisdiction—Suit by Putneedar for khas possession against tenant who has sold his rights and interests to a third party.

Case No. 1596 of 1863.

Special Appeal from a decision passed by Mr. J. E. S. Lillie, Judge of Hooghly, dated the 30th June 1862, *affirming a decision passed by Baboo Kishen Chunder Chowdhry, Moonsiff of that District, dated the 28th September* 1861.

Sein for Respondent.

A suit by a putneedar to recover khas possession of land against a tenant who has sold his rights and interests to a third party, is cognizable only by a Revenue Court under Clause 5 Section 23 Act X of 1859.

THIS was a suit which was thus framed in the plaint—that the plaintiff is the putneedar; that the first defendant was his tenant, and held a Ghur Mowrosee tenure; that on the plaintiff hearing that the defendant alleged in a petition to the Collector that he had sold his rights and interests in the tenure to a third party, the plaintiff brings a suit to recover khas possession, inasmuch as the tenant had no right to alienate. The purchaser is made a defendant, but possession is not asked from his hands.

We think that this is a suit which falls within the provisions of Clause 5, Section 23, Act X of 1859; and that the Civil Court had no jurisdiction. If the ryot is liable to ejectment for a breach of the conditions of his lease, the question must be tried under the aforesaid Act, and no other Court can take cognizance of such an action.

The appeal must be decreed, and the decision of the Judge reversed with costs and interest.

The 22nd February 1865.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Evidence (of rent paid)—Factory books (sworn to by Manager).

Case No. 1076 of 1864 under Act X of 1859.

Special Appeal from a decision passed by Mr. C. S. Belli, Judge of Rajshahye, dated the 2nd February 1864, *reversing a decision passed by Baboo Poorno Chunder Banerjee, Deputy Collector of that District, dated the 20th January* 1862.

Kalee Kant Mojoomdar and others (Plaintiffs), *Appellants,*

versus

Messrs. R. Watson and Co. (Defendants), *Respondents.*

Baboos Kishen Succa Mookerjee and *Sreenath Doss* for Appellants.

Mr. R. T. Allan for Respondents.

The account-books of a Factory regularly sworn to by the manager are legal evidence of payment of rent.

THIS case was remanded by the High Court on the 6th September 1863, with directions to adjudicate on the evidence adduced in support of the payment of rent by the Messrs. Watson.

The Judge has now done so. He took the evidence of the manager of the factory, and examined the account-books for the years during which the payments were alleged to have been made, and on this evidence found for the defendant, who is now the special respondent before us.

The only point urged in special appeal is, that there was no legal evidence to justify this finding.

We see no reason to interfere. The account-books of the factory were regularly sworn to by the manager, and by them the payment of the rent claimed was established. There can be no doubt, that this was perfectly legal evidence, and the Judge has held it to be sufficient evidence.

With the latter point we have nothing to do in special appeal. It is enough that the evidence was legal evidence to necessitate our dismissing this special appeal with costs.

The 27th February 1865.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Jurisdiction may be questioned at any stage.

Case No. 1087 of 1864 under Act X of 1859.

Special Appeal from a decision passed by Mr. F. B. Simson, Judge of Jessore, dated the 18th February 1864, reversing a decision passed by Baboo Jugyur Nath Dershad Banerjee, Officiating Deputy Collector of that District, dated the 14th January 1863.

Sushteebur Mookerjee and another (Plaintiffs), *Appellants,*

versus

Mr. H. Mackenzie (Defendant), *Respondent.*

Baboo Khetter Mohun Mookerjee for Appellants.

Baboo Banee Madhub Banerjee for Respondent.

An objection that the suit is barred and that the Court has therefore no jurisdiction, may be taken at any stage of a case.

THIS is a suit for rent. The lease expired in 1264 admittedly. The suit is brought on the 31st July 1862. The suit is, therefore, clearly barred under Section 32 Act X of 1859. It may be that the defendant did not raise the plea in bar; but as the plaint clearly shows that the claim is barred, and as there are rulings of this Court that the question being one of jurisdiction, can be taken at any stage of the case, we must dismiss this appeal. It is needless to remand a case for further evidence when it is patent in the plaint itself that the claim is barred.

Dismissed with costs and interest.

The 10th March 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Revival of suit—Reversal of original decree—Intervenor.

No. 480 of 1864 under Act X of 1859.

Miscellaneous Appeal from an order passed by the Judge of Mymensingh, dated the 7th June 1864, *reversing an order passed by the Deputy Collector of that District, dated the 14th January* 1864.

Dunkoo Dutt *alias* Kalee Dutt (Judgment-debtor), *Appellant,*

versus

Goluck Mohun Chowdhry (Decree-holder), *Respondent.*

Baboos Prosunno Coomar Sein and *Lulleet Mohun Sein* for Appellant.

None for Respondent.

The defendant applied, under Section 58 Act X of 1859, for the revival of a suit decreed *ex-parte*, and notice was served on the plaintiff to appear in support of his decree. On the day appointed, neither party appeared, and the Deputy Collector, after refusing to enter into the claim of an intervenor, struck off the case, declaring the original decree cancelled.

HELD that the Deputy Collector was right in not going into the claim of an intervenor at that stage, but that he acted contrary to law in cancelling the original decree till after the defendant had satisfied him that there were good and sufficient grounds for reviving the suit before reversing the original decree, whether the plaintiff was present or absent.

PLAINTIFF brought a suit for rent, and obtained an *ex-parte* decree. The defendant, under the provisions of Section 58 Act X of 1858, applied for a revival of the suit, and notice was served on the plaintiff to appear in support of his decree. On the day appointed, neither the defendant nor the plaintiff appeared; and the Deputy Collector took up the case, and refusing to enter into the claim of an intervenor, at once struck off the case, declaring the original decree cancelled.

The Deputy Collector was quite right in not going into the claim of an intervenor at that stage of the proceedings. But we think he acted altogether contrary to law in cancelling the original decree till he had admitted the review after the defendant had satisfied him that there were good and sufficient grounds for the revival of the suit. The fact of the plaintiff's absence was no sufficient ground for the reversal of the original decree, passed in favor of the plaintiff. If the defendant, on whose application the suit was sought to be revived, failed to appear his case should have been struck off, and the decree allowed to remain intact.

Had he appeared on the day appointed, and had plaintiff failed to do so, still the defendant would have been required to prove to the satisfaction of the Court that there were good and sufficient grounds for reviving the case before the decree could be set aside. We think the order passed by the Deputy Collector is illegal: and, therefore, under the provisions of Section 35 Act XXIII of 1861, we reverse it, and restore the decree of the plaintiff. Goluck Mohun, and confirm the order of the Judge.

The special appeal is dismissed.

The 11th March 1865.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Jurisdiction—Suit by a vendee against his vendor's ryot.

Case No. 2175 of 1864.

Special Appeal from a decision passed by the Judge of Backergunge, dated the 12th May 1864, *affirming a decision passed by the Moonsiff of that District, dated the 19th September* 1863.

Ufsuroodeen (Defendant), *Appellant,*

versus

Akbur Ali Howaldar and others (Plaintiffs), *Respondents.*

Baboo Bamachurn Banerjee for Appellant.

Baboo Nil Madhub Bose for Respondents.

A suit against a ryot claiming to hold under a pottah from the same party from whom the plaintiff claims as vendee, is not cognizable under Act X of 1859.

THE special appellant's akeel is not present. We have, however, looked into the case, and find that special appellant is in no way endamaged by the absence of his pleader, as there is not the least ground of special appeal.

The objection taken is that the suit ought to have been brought under Act X Section 23 Clause 6.

This Section, we observe, refers to suits to recover possession of land from which a ryot has been dispossessed by the person entitled to receive rent for the same.

Now, it is quite clear from the special appellant's own statement that he is only a ryot himself, claiming to hold the land under a pottah from the same party from whom the special respondent claims as vendee.

In no case, therefore, would the case be cognizable under Act X of 1859; it must have been brought in the Civil Court.

For the rest, the Judge has found as a fact that the special respondent's purchase is proved, and that the pottah set up by the special appellant is false.

We, therefore, dismiss the special appeal with costs.

The 16th March 1865.

Present:

The Hon'ble G. Campbell and A. G. Macpherson, *Judges.*

Lease of Jungle lands—Construction.

Case No. 328 of 1864 under Act X of 1859.

Regular Appeal from a decision passed by the Deputy Collector of the 24-Pergunnahs, dated the 30th August 1864.

Bharut Chunder Roy and others (Defendants), *Appellants,*

versus

Issur Chunder Sircar, on behalf of Nawab Nazir Siddi Nazir Ali Khan (Plaintiff), *Respondent.*

Mr. R. T. Allan and *Baboos Sreenath Doss* and *Bhuggobutty Churn Ghose* for Appellants.

Messrs. G. C. Paul and *A. F. Lingham* and *Baboo Ashootosh Dhur* for Respondent.

Suit laid at Rupees 22,483.

The defendant held under a lease dated 1851, which provided that no rent should be claimable for jungle lands until they had been enjoyed rent-free for 12 years. HELD that the rent-free possession contemplated was not a possession for the 12 years immediately following 1851, but for 12 years *generally*; and that, in a suit for rent for 1863, the defendant was entitled to plead that he had not had possession rent-free for 12 years.

THIS is a suit for rent under Clause 4 of Section 23 of Act X of 1859.

The plaintiff (who is the respondent in this Court) in 1851 purchased certain Soonderbun lots from the Nawab Nazim of Moorshedabad, who had obtained a grant from Government on the 11th of June 1851; the Nawab had given the defendant (now the appellant) a pottah or rather an amulnamah of some of the lands comprised in the grant. The pottah states that the lands contained in all 42,000 beegahs, and continues "fixing "the rate at 12 annas a beegah for the cleared "lands and 10 annas a beegah for the jungle "lands, after holding the latter rent-free for a "period of 12 years from 1852 to 1862, and "offering to pay rent for the lands now co-"vered with jungle from the year 1863, cor-"responding to 1270 B. S." The appellant then agrees to clear the jungle in five years, and to take it as a fact, until an accurate measurement could be made, that there were 10,424 beegahs of cleared lands, which were to be paid for from the first at the rate of 12 annas. And the pottah or amulnamah concludes with the following paragraphs:—"Within six months "from this date in your presence the "lands cleared and cultivated up to 1275," which was the year prior to that in which the agreement was made, "shall be mea-"sured by an Ameen, and whatever quantity "of *hasil* lands may be ascertained to exist "in excess of the aforesaid conditionally "settled jummah, you will pay rents for such "excess quantity, at the said rate of twelve "annas; and if it be found less, you will ob-"tain an abatement of the said conditionally "settled jummah at that rate. Out of the "aforesaid 42,600 beegahs, whatever quanti-"ty of land may be ascertained in your "presence by a measuring Ameen to have "been cultivated up to 1257 B. S., of such "quantity at twelve annas a beegah; and of "the remaining jungle land after the aforesaid "12 years rent-free holding in 1270 B. S. "at 10 annas a beegah, a Permanent Settle-"ment will be effected with you."

Under this pottah or amulnamah the appellant was put in possession; but, in April 1852, he was turned out by one Terry who had obtained an award in his favor in a case brought under Act IV of 1840. The title set up by Terry was adverse to that of the respondent, who accordingly at once instituted proceedings to establsh his rights, and to recover possession of the lands from which the appellant had been evicted. In March 1853, these proceedings terminated amicably, the respondent and Terry having come to a compromise under the terms of which

the respondent was restored to possession of the lands in question. The appellant, however, was not replaced in possession; and, in December 1853, the respondent gave a fresh pottah of these same lands to one Nundolall, who (or those claiming under whom) remained in possession down to 1860. In the latter part of that year, the appellant came forward and instituted a suit in *formâ pauperis* against the respondent, Nundolall, and Terry, the object of the suit being to recover *khas* possession under the pottah which had been granted to him in 1851, with *wasilat* "together with damages and interest from all the defendants." He succeeded in making good his claim, and got a decree for possession with *wasilat*. This decree, which was given in August 1862, was confirmed by this Court, on appeal, in December 1863; and the appellant was put in possession in November 1862. The respondent subsequently got a decree for the rent of the *hasil* lands for the months of 1269 during which the appellant had possession. The appellant then sued for abatement of rent, on the ground that the quantity of *hasil* lands was less than the quantity given in the pottah, and that the lands ought to have been measured, &c., as provided in the pottah. This suit was decided by the Court in favor of the respondent, but an appeal from that decision is still pending before this Court. The respondent, in July 1864, instituted the present suit to recover the rent for 1270 of both the *hasil* and the jungle lands, claiming for the latter at the rate of 10 annas a beegah, the rate which, as the respondent contends, the appellant agreed to pay for the jungle lands from the year 1270.

The appellant, in the Court of first instance, pleaded that he was not liable to pay any rent whatever for the jungle lands, because he was, by the terms of his pottah, entitled to hold those lands rent-free for twelve years, which he had not done as he was kept out of possession by the respondent and his lessee until 1269 when he was restored to possession under the decree which he had obtained; and as regards the rent of the *hasil* lands, the appellant pleaded that a suit for rent would not lie, because the quantity of *hasil* land had not yet been ascertained by actual measurement, and no final settlement of them had been made, and further that the real quantity of *hasil* lands did not exceed 3,700 beegahs, and that therefore there could, in no event, be a decree for the rent of a larger quantity.

The Deputy Collector who tried the case, decided that the appellant was liable for the rent of the jungle lands at the rate agreed upon. The Deputy Collector was of opinion that the agreement between the parties was that the appellant should hold the lands rent-free during the specific years named, *viz.*, from 1851 to 1862, and that he should pay rent for them in any event from the year 1263 to 1270: and he held that inasmuch as it was no longer possible that the appellant should have the rent-free occupation for which he had stipulated, the appellant might have a claim against respondent for damages for the loss he had sustained by being kept not of possession, but that he could not refuse to pay the stipulated rent, the more especially as he had sued for possession under the pottah, and had got a decree for it with wasilat. As regards the *hasil* lands, the appellant was also held liable as being estoppel from raising the defence which he wished to raise by the decision against him in the suit for abatement, the abatement being there claimed on exactly the same grounds as those advanced in this suit for exempting him from liability.

From this decision the appellant appeals, repeating before us the pleas and arguments which he urged in the Lower Court.

We think that the decision appealed from is wrong, and ought to be reversed so far as it regards the jungle lands. It appears to us that the rent-free possession, which the parties contemplated, was not possession for the specific years 1851 to 1862, but for twelve years *generally*. It was clearly the intention of the contracting parties that no rent should be payable for these lands until the lessee had held them rent-free for twelve years. The lease may have been made with reference to the terms of the grant which the lessor had of the lands from Government, and which provided that Government might resume the lands, if not cleared according to certain conditions prescribed, by the year 1864. But, nevertheless, the lease substantially provides that no rent shall be claimable for the jungle lands until they have been enjoyed rent-free for twelve years. In this view of the case, the decree which the appellant got in his suit for possession, does not debar him from raising his present defence. It is to be observed, moreover, that although the plaint in that suit claimed "possession with *wasilat* and damages," still the suit was, in fact, merely one for possession and *wasilat*. No question was raised as to any damages save *wasilat*; and the *wasilat* given was in

respect of the *hasil* lands only, the jungle lands not being included at all in the calculation. On the whole we think that the appellant is not liable for the rents of the jungle lands which have been claimed in this suit, and the decision of the Deputy Collector, so far as it relates to those rents, must be reversed.

As regards the *hasil* lands, the decision of the Lower Court will be confirmed. The appellant having based his suit for abatement on the same grounds as those on which he now resists payment of the rent claimed, and the abatement suit having been decided against him, the matter is concluded so far as this suit is concerned. The decree in the abatement suit has not been set aside, and the fact that an appeal from it is pending cannot alter its effect in any way.

The decree of the Lower Court is confirmed as regards the *hasil* lands; but under the circumstances each party must bear his own costs of suit both in appeal and in the Lower Court.

The 23rd March 1865.

Present:

The Hon'ble George Loch and W. S. Seton-Karr, *Judges.*

Sale of zemindary rights by Government —Relative position of purchaser and of Talookdars.

Case No. 361 of 1864 under Act X of 1859.

Regular Appeal from a decision of Baboo G. G. Bose, Deputy Collector of Tipperah, dated 7th June 1864.

Obhoy Churn Roy and others (Plaintiffs), *Appellants,*

versus

Rajah Asanoollah (Defendant), *Respondent.*

Baboos Onocool Chunder Mookergee, Dwarkanath Mitter and *Romesh Chunder Mitter* for Appellants.

Messrs. R. T. Allan, R. E. Twidale and *C. Gregory* for Respondent.

The Government, as auction-purchaser of the zemindary right of a pergunnah, having waived all rights to cancel the tenures of the talookdars, and having addmitted them to settlement and otherwise recognized their rights, it was held that the defendant, a purchaser, could not put in force against the talookdars any rights which his vendor had waived.

THIS is a case of which the facts are very clearly given by the Deputy Collector in his judgment.

Certain talooks, of which the plaintiffs possess the one in dispute, were created subsequent to the Decennial Settlement in Pergunnah Balda-Khal. Government became the purchaser of the zemindaree rights in this Pergunnah in 1835 and 1836, and afterwards concluded a settlement with the above talookdars for 20 years from 1242 to 1262.

Settlements for shorter periods were afterwards made, and the last expired at the close of Choitro 1269.

About eight months afterwards, and before any settlement had been renewed with the talookdars, Government sold its zemindaree rights in this property, and the defendant became the purchaser. On this the plaintiff brings his suit under Clause 6 Section 23 of Act X of 1859, alleging that he has been ejected by the defendant, and that he has a right to be restored to possession.

The Deputy Collector, rejecting a plea that the case was not for the Revenue but for the Civil Courts, has ruled that the talookdar, plaintiff, has not been in possession since the commencement of the year 1270, inasmuch as the Collector had then prohibited the ryots from paying their rents to the plaintiff; and the Lower Court has further found that, in the kubooleuts executed by the plaintiffs in 1242 and 1269, there was no condition entitling them to renewal of the lease. The Court has also ruled that the settlement was an act of benevolence on the part of the Government; and that the defendant, purchaser of the zemindaree rights from Government, is not bound to renew or continue the same.

We have heard the case in appeal against this ruling very fully argued by Baboo Dwarkanath Mitter for the appellant, and by Mr. Allan for the purchaser of the rights of the Government.

One strong contention of Mr. Allan has been that the plaintiff has no right of action against the defendant, because the latter has not ejected him. The Lower Court, he argues, has found, and this finding is not disputed, that the plaintiff had no practical possession between Choitro 1269 and Aughran 1270, a space of eight months; and it is contended on these facts, that the ouster was the act of Government, and that the action will not lie.

We think that the above argument, however ingenious and plausible at first sight, is no bar to the plaintiff's suit. The proclamation of the Collector is nothing more than what is always done in these cases at the termination of one settlement, and before the commencement of another. The rights of the talookdars, whatever they were at the sale of the zemindaree rights to the defendant, were, we find, expressly reserved by Government, on a petition presented on their behalf by their Attorney. We can only admit that these talookdaree rights were, for a time, in abeyance; and if the plaintiff sues within one year after ejectment, as he has done, he is in time, whether he brings his suit against the Government or against the defendant, purchaser, who stands exactly in the shoes of Government.

In this view we think the action does lie; and we have now only to consider whether any special right against the talookdars was waived, or whether any promise was made in their favor by the Government, whereby the defendant would be barred.

On this point, stress is laid on some letters and proceedings of the Revenue Authorities of 1836 and 1839.

By the letter of the 13th of February 1836, the Board of Revenue admitted that the talookdar, though not specially protected from increase or assessment after a sale for arrears, could not be dispossessed at the will of the purchaser; that his rights "remained unimpaired;" and that he was only liable to assessment at the full Pergunnah rates.

The Board further stated that these talookdars were liable to indulgence, because their tenures had been purchased by them between 1817 and 1822 under the old Sale laws previous to Regulation XI of 1822; and that they had consequently been led to look on their right of possession as fixed and permanent, notwithstanding a sale of the estate.

It is clear, too, from the proceedings of the Deputy Collector of Tipperah, taken in conformity to express injunctions of the Commissioner, Mr. Harvey, of the 3rd September 1839, that those talookdars who came forward to make the settlement, were given to understand that, on its termination, they would be admitted to renewed settlements at the Pergunnah rates; and arrangements were also made by which, on default of payment of assessment, their tenures were liable to sale in the same manner as putnee or permanent tenures would have been.

As the case has been argued, and on the proofs advanced, it seems to us that the Government, as auction-purchaser, not only waived any rights to cancel the tenures of the talookdars, but actually admitted them to settlement, held out to them a promise of renewal, and, at the time when it disposed of its zemindaree rights to the defendants, recorded a resolution on a petition presented on behalf of the talookdars that nothing was sold by the zemindaree rights, and that the talookdaree rights, *whatever they might be*, would be respected.

The language, it is true, is carefully guarded, but the intention of Government is sufficiently clear and must be collected from the Revenue letters and proceedings of 1836 and 1839; and we think that the defendant, purchaser, is bound to respect the intentions of Government, cannot put in force any rights which his vendor had actually waived, and must, therefore, respect the tenures of the plaintiff and of persons in the same position.

This view, to our thinking, is confirmed by a late decision of the Privy Council, printed in the Hindoo Patriot of February 20th, 1865, which seems to lay it down that even under the old Sale law prior to 1822, such talookdaree rights were not liable to cancelment but only to a certain limited increase of rent, "according to the established usage and rents of the Pergunnah."

If then, the Government never availed itself of such a right and the talookdaree right of the plaintiff was merely in abeyance for 8 months of 1270, the plaintiff, we think, has fairly made out his claim to re-entry.

The decision of the Lower Court, which otherwise is well reasoned and well expressed, does not seem to have had its attention given to the Revenue proceedings on which stress has justly been made.

In this view, we reverse the decision of the Deputy Collector and decree the appeal with costs.

The 24th March 1865.

Present:

The Hon'ble E. Jackson and F. A. Glover, *Judges.*

Limitation—Arrear of rent (when due).

Case No. 2177 of 1864 under Act X of 1859.

Special Appeal from a decision passed by the Judge of Dinagepore, dated the 12th May 1864, affirming a decision passed by the Collector of that District, dated the 11th August 1863.

Komul Lochun Roy and another (Plaintiffs), *Appellants,*

versus

Messrs. Moran and Co. (Defendants), *Respondents.*

Baboos Mohesh Chunder Chowdhry and *Gopal Lal Mitter* for Appellants.

Mr. R. T. Allan and *Baboo Hem Chunder Banerjee* for Respondents.

An arrear of rent is not due within the meaning of Section 32 Act X of 1859 until the rent itself has been determined.

THIS was a suit for arrears of rent for the years 1261 to 1266, brought in the year 1270. It has been dismissed as barred by limitation under Section 32 of Act X of 1859.

It is said on special appeal that the rent, payable by the ryot was not ascertained until the year 1270, and that proceedings to fix the rent had been pending in the Courts from 1263 to 1270; that, with reference to the precedent of the 9th February 1865, in Special appeals Nos. 2891 and 2892 of 1864 (*see* Sutherland's Reports for March 1865, page 51), this suit was within time.

We agree with the view of the law taken in the above referred to special appeals, that there cannot be said to be an arrear of rent until the rent has been ascertained; and that consequently an arrear of rent cannot, within the words of Section 32 of Act X, become due until the rent itself has been determined. If the rent in this case was not determined until 1270 the plaintiff is within time.

The Lower Court's judgment is reversed and the case remanded for trial on the remaining issues which arise in it.

The 24th March 1865.

Present:

The Hon'ble A. Jackson and F. A. Glover, *Judges.*

Occupancy (No right of, in land not paying rent).

Case No. 3184 of 1864.

Special Appeal from a decision passed by Baboo Kashishur Mitter, Judge of the Small Cause Court, exercising the powers of the Principal Sudder Ameen of Moorshedabad, dated the 15th July 1864, *modifying a decision passed by Baboo Shama Dhun Mookerjee, Moonsiff of that District, dated the 7th December* 1863.

Goreeb Mundul and others (Defendants), *Appellants,*

versus

Bhoobun Mohun Sein (Plaintiff), *Respondent.*

Baboo Tarucknath Sein for Appellants.

Baboos Mohinee Mohun Roy for Respondent.

A ryot who secretly possesses himself of land and pays no rent for it, has no right of occupancy in that land.

THE defendant, a tenant of the zemindar as respects 18 beegahs for which he holds a pottah and pays rent, claims before us in special appeal a right of occupancy as respects 16 other beegahs for which it has been found that he holds no pottah and pays no rent, but of which he alleges that he has held possession.

The law, Section 6 Act X of 1859, lays down that "every ryot who has held land for a period of 12 years has right of occupancy in the land so held by him so long as he pays the rent payable on account of the same." The defendant does not come within this definition. He appears to have secretly possessed himself of the land and to have paid no rent for it. He has no right of occupancy in that land.

Appeal dismissed with costs.

The 24th March 1865.

Present :

The Hon'ble W. Morgan and Shumboonath Pundit, *Judges.*

Jurisdiction—Suit in Civil Court to try validity of an ousut talook—Previous suit under Act X of 1859 for illegal ejectment.

Case No. 2827 of 1864.

Special Appeal from a decision passed by Mr. W. Tucker, Judge of Backergunge, dated the 26th August 1864, *reversing a decision passed by the Principal Sudder Ameen of that District, dated the 19th May* 1864.

Ram Chunder Goopto (Plaintiff), *Appellant,*

versus

Bhuggobutty Dabea and others (Defendants), *Respondents.*

Baboos Romesh Chunder Mitter and *Kally Mohun Doss* for Appellant.

Baboo Gopal Lall Mitter for Respondents.

A suit instituted in the Civil Court to obtain an adjudication on the validity or otherwise of an ousut talook claimed by the defendant in property purchased by the plaintiff, is not affected by a previous suit successfully brought by the now defendant under Act X of 1859, to recover possession of the property from which he had been illegally ejected, the title not having been put in issue in the previous suit.

THE plaintiff is entitled to maintain this suit in the ordinary Civil Courts of Judicature for the purpose of obtaining an adjudication on the validity or otherwise of the ousut talook which the defendant claims to have in the property which the plaintiff has purchased; and the provisions of Act X of 1859 in no way affect this right of suit. The previous litigation between the same parties in the Collector's Court, under the 6th Clause of the 23rd Section of Act X does not preclude the plaintiff from litigating the question now in issue, which, we are satisfied, has not hitherto been tried. The now defendant was the plaintiff in that suit, and he then sought to recover possession of the property from which he said he had been illegally ejected. He failed in the Deputy Collector's Court, but obtained a decree in the Judge's Court upon a finding in his favor of the following issue:—"Was

"the plaintiff in possession at the time of "the defendant's purchase of the land in dis- "pute as ousut talookdar?" One Chunder Mohun, the former proprietor, whose interest the present plaintiff purchased, having admitted that certain dakhilas produced by the then plaintiff were genuine, the Court ordered him to be put in possession. The title was in no way put in issuei n that case, nor was it ascertained that the ousut talook had any legal existence. Some slight proof was, or was assumed to have been, given to show that in fact the then plaintiff, in fact, occupied or held possession of the land or tenure, and that his occupation or possession had not been lawfully put an end to, and this was all.

We think the Judge of the Lower Appellate Court, holding that this previous suit under Act X prevents the plaintiff from maintaining the present suit, is wrong, and that the plaintiff is entitled to the judgment of the Civil Court as to the validity of the alleged ousut talook, a matter which has never yet been put in issue or determined. We remand the case to the Lower Appellate Court for trial.

The 24th March 1865.

Present:

The Hon'ble Shumboonath Pundit and G. Campbell, *Judges.*

Measurement of land—Appeal.

Case No. 401 of 1864 under Act X of 1859.

Regular Appeal from a decision passed by Baboo Sham Chunder Nauth, Deputy Collector of Ferozepore, in Zillah Backergunge, dated the 16th July 1864.

Khaja Abdool Gunee (Defendant), *Appellant,*

versus

Rajah Sutto Churn Ghosal (Plaintiff), *Respondent.*

Messrs. R. T. Allan and *R. E. Twidale* for Appellant.

Baboos Kishen Kishore Ghose and *Obhoy Churn Bose* for Respondent.

Under Section 10 Act VI of 1862 B. C. an appeal lies to the High Court in cases (above 5,000 Rupees in value) relating to measurement of land.

Under Section 9 of the same Act a zemindar can measure all the lands of his zemindaree whenever he pleases unless he is restrained by any express engagements.

SECTION 10 of Act VI of 1862 of the Bengal Legislature gives a right of appeal to this Court in this case, which is valued higher than 5,000 rupees.

There is, however, no ground for appeal. By Section 9 of the same Act, which is passed in modification of Section 26 of Act X of 1859, every zemindar has a right to measure all the lands of his zemindaree, unless he is restrained by any express engagements.

In the present case, there is no question of enhancement pending before us, and the right of measurement is no longer limited to cases where the landlord may require the same for the sake of fixing or enhancing the rents due to land. The appellant does not also plead any expressed restrictions against the measurement.

This appeal is accordingly dismissed with costs allowed in Civil Courts upon the value adopted by the appellant.

The 24th March 1865.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Execution under process of Civil Court, not ipso facto legal—Hypothecation and liability of tenure for its own arrears.

Case No. 2931 of 1864 under Act X of 1859.

Special Appeal from a decision passed by Mr. A. Pigou, Judge of Hooghly, dated the 8th July 1864, *affirming a decision passed by Mr. W. R. Larminie, Assistant Collector of that District, dated the 15th December* 1863.

Umurt Lal Bose (one of the Defendants), *Appellants,*

versus

Soorubee Dossee and others (Plaintiffs), and the rest of the Defendants, *Respondents.*

Baboos Bama Churn Banerjee and *Ashootosh Dhur* for Appellant.

Baboo Boykantnath Paul for Respondents.

Execution under process of a Civil Court is not *ipso facto* legal—*e. g.* when taken against those who were not parties to the decree or are distinctly exempted from the operation of the decree.

It is only when a tenure is sold for its own arrears that there is an hypothecation and liability of the tenure itself.

THE facts of this case are these. One Ram Mohun had a jote or tenure as a ryot.

A creditor sued Ram Mohun for a debt (not being arrears of rent of the tenure) and got a decree, and, in execution of that decree, sold the rights and interests of Ram Mohun in the tenure. Ram Coomar (the plaintiff here) was the purchaser. On his purchase he went to the defendant, the zemindar, and, on the strength of his sale certificate, asked for a transfer of his name in the place of that of Ram Mohun, and for an order for possession. Such an order or amulnamah was given him by the defendant zemindar, on the 28th Aughurn 1268 B. S. (12th December 1861 A. D). The substance of that amulnamah was that, as Ram Coomar had shewn by his sale certificate that he had been the purchaser of Ram Mohun's jote, and wished to have a transfer of names, this had been accorded, and the amulnamah given; that Ram Coomar would pay the (specified) jumma for the (defined) arrear according as each (detailed) instalment of rent become due without objection. The instalments were scheduled as from the date of the amulnamah; and it is found as a fact that, from the 12th December 1862 till nearly the period of suit, Ram Coomar, plaintiff, for nearly two years paid, and the zemindar defendant received from plaintiff the rents so scheduled, and receipts are filed by Ram Coomar, shewing this fact. Nothing was stated in the amulnamah (nor is it pleaded in any other document or in any other way) that plaintiff, Ram Coomar, was to be liable for the old arrears of rent due by Ram Mohun to the zemindar defendant. It is found as a fact by the Courts below, that the amulnamah and receipts are genuine and *bonâ fide*.

The defendant zemindar got a decree for arrears of rent on 21st February 1863, against Ram Mohun. Ram Coomar intervened in that case; and was made a defendant. In the judgment, it is clearly stated that the possession of Ram Coomar was not to be disturbed under that decree, nor his rights prejudiced.

The decretal order decreed the arrears sued for by defendant zemindar, and also that if they were not paid in fifteen days, ejectment (jote burkast) was to follow.

On the 30th July 1863, in execution of this decree, defendant zemindar tried to oust Ram Coomar, and Ram Coomar's intervention was rejected, and he was ousted. Ram Coomar, therefore, as plaintiff, sued under Clause 6 Section 23 Act X of 1859 to recover possession. Both the Lower Courts have decreed him possession under the facts which they have found as above set forth.

It is now urged in special appeal: 1*st*—That Clause 6 Section 23 Act X of 1859 contemplates suits only for *illegal* ouster and that as plaintiff, Ram Coomar's ouster, was by process of Court, *i. e.*, under the Civil Court's orders of 21st February and 30th July 1863, there was no illegal ouster, and that it follows that plaintiff's action cannot lie.

2*nd*.—That every tenure is hypothecated for its owns arrears, and that consequently every tenant of such tenure is liable to ejectment on failure to pay any rents due on the tenure; and that thus Ram Coomar is legally liable to be ejected from the tenure of the defaulter Ram Mohun, as he has not paid the arrears due on the tenure; that consequently there *was* no *illegal* ejectment to warrant the Lower Courts giving Ram Coomar a decree for possession.

We are of opinion that both these grounds are untenable. On the *first* we observe that the fact of there being action under process of a Civil Court does not make such action *ipso facto* legal; and certainly such action is *illigal* where it is taken against those who are *not* parties to the decree or are (as Ram Coomar was here) *distinctly* exempted from the operation of the decree with possession reserved in express terms.

It is pleaded that the *decretal order* does not contain the exemption. But we remark that the *judgment* does; and the decretal order does not contain the reservation solely by reason of the fact that as Ram Coomar had by the *judgment* been protected from ejectment, and exempted from liability, he probably was not considered to be any longer a *party* who would come *under the purview and operation of the decretal order*.

On the *second* plea, we remark that it is only when tenures are sold *for their own arrears* that there is an hypothecation and a liability of the tenure itself, in other hands then the defaulter's for the arrears, and even then each case must be decided by its own peculiar circumstances.

In this case, after a full argument and careful consideration of the facts and documents, we are *clearly* of opinion, that by the terms of the amulnamah, and the receipt of prospective rent under it, and *it only*, and by the absence of stipulation or demand till now for the arrears, defendant zemindar did, *in fact*, enter into a completely *new arrangement* and *lease* with plaintiff Ram Coomar *irrespective* of all claims for the arrears due by Ram Mohun; and that the

ejectment of Ram Coomar by the zemindar, special appellant, under color of law is highly illegal and improper.

We accordingly reject the special appeal of defendant with all costs in all Courts.

The 27th March 1865.

Present:

The Hon'ble W. Morgan and Shumboonath Pundit, *Judges.*

Act VI of 1862 B. C.—Tender not followed by deposit or payment into Court—Interest—Costs.

Case No. 2847 of 1864 under Act X of 1859.

Special Appeal from a decision passed by Mr. F. L. Beaufort, Judge of the 24-Pergunnahs, dated the 30th June 1864, modifying a decision passed by the Deputy Collector of that District, dated the 2nd April 1864.

Bissonath Deb (Defendant), *Appellant,*

versus

Hurro Pershaud Chowdhry and Protab Chunder Roy Chowdhry (Plaintiffs), *Respondents.*

Baboos Romesh Chunder Mitter and *Kadernath Chatterjee* for Appellant.

Mr. R. T. Allan and *Baboos Banee Madhub Banerjee* and *Anund Chunder Ghosaul* for Respondents.

Act VI of 1862 B. C. does not forbid the Court to advert or give effect to a tender not followed by a deposit or payment into Court of the money: nor does it alter or affect the discretionary power of the Court to award interest or costs in a decree for arrears.

THE provisions of Section 4 Act VI of 1862 of the Bengal Council give to a tender, which is followed by a deposit of the amount tendered in the Court of the Collector, "the full effect of a payment then made." The Appellate Court observes that "the only tender of payment which can "now be pleaded, or to which the Court "can listen, is the deposit of the amount "due in the Collectorate." This remark is made with reference to a part of the decision of the Court of first instance, by which (a previous tender of rent having been made and refused) the Court of first instance had disallowed the plaintiff's claim to interest and costs.

We think that the Lower Appellate Court is wrong in the view it has stated of the law. Although the Act cited provides for and declares the effect of a tender followed by a deposit in Court of the amount previous to the institution of any suit, as also of a tender followed by a payment into Court of the amount subsequent to the institution of a suit; and further subjects a defendant, who has made no tender before suit to a liability for additional damages at the discretion of the Court (*see* Section 2), yet the law does not forbid the Court to advert or give effect to a tender not followed by a deposit or payment into Court of the money. The Court may still, in considering whether the decree for arrears should also award interest and costs to the plaintiff, bear in mind the fact (if it is established) that a previous tender was made. The provisions of the Act do not alter or affect the discretionary power of the Court to determine whether interest under the 20th Section of Act X of 1859 should be awarded, or what costs should be given. In cases falling within Sections 7 and 8, the costs of suit are not within the Court's power: in other cases the power of the Court is enlarged, to enable it to award damages in addition to costs; but these provisions do not interfere with the Court's discretionary power in cases not governed by them.

As the Court has misconstrued the law, we must remand the case in order that the Lower Appellate Court may determine the question of interest and costs, as it may think just, after enquiring whether the defendant did, in fact, tender any and what sum to the plaintiff before the institution of the suit as alleged by him.

The 28th March 1865.

Present:

The Hon'ble W. Morgan and Shumboonath Pundit, *Judges.*

Dispossession (by person not entitled to receive rent)—Right of sub-tenants to sue

Case No. 2842 of 1864.

Special Appeal from a decision passed by Moulvie Nuzeerooddeen Ahmed Khan Bahadoor, Principal Sudder Ameen of Hooghly, dated the 28th June 1864, of

The 28th March 1865.

Present:

The Hon'ble Shumboonath Pundit and A. G. Macpherson, *Judges.*

Suit to contest notice of enhancement—Fixing of proper rent.

Case No. 2882 of 1864 under Act X of 1859.

Special Appeal from a decision passed by Mr. J. R. Muspratt, Judge of Purneah dated the 30th June 1864, affirming a decision passed by Mr. R. C. P. Perry, Deputy Collector of that District, dated the 27th July 1863.

Sheikh Gholamee (Plaintiff), *Appellant,*

versus

Imam Buksh (Defendant), *Respondent.*

Mr. A. F. Lingham for Appellant.

None for Respondent.

A ryot, who contests his landlord's right to demand enhanced rent and fails to prove his own right to exemption, may, notwithstanding, ask the Court to fix the proper enhanced rents.

On notice for enhancement being served upon the special appellant, under Section 13 of Act X of 1859, he instituted this suit under Section 14 of the Act.

Both the Lower Courts, holding the special appellant's tenure liable to an enhancement, have fixed the rate at which he should hold.

The special appellant, quoting the judgment of the High Court, dated 11th November 1862 (reported in pages 185-186 of Marshall's Reports) argues that the Courts below should have simply dismissed his case when they found that he had no ground to dispute the right to enhance. It appears that the first Court had, after over-ruling the objection of the plaintiff regarding the right of the landlord to enhance, fixed the proper rates of the rents. This decree was appealed against by the special appellant himself, on the ground only of the provisions of Section 17 of Act X of 1859 not being observed before the proper rents were fixed. No objection was then taken against this order of fixing the rents as beyond the scope of Section 14, or beyond the end of the special appellant's suit. The case was remanded, and an Ameen appointed under the orders of the Lower Appellate Court; and the present decisions of both the Lower Courts are passed subsequent to this remand. Even in the reasons of the second appeal preferred by the special appellant, no objection is raised against the fixing of the rates. The special appellant, therefore, appears to have hitherto allowed the investigation of the rates to proceed, and perhaps to have asked for it himself. We do not read the decision quoted by the special appellant to rule that in such cases as that of the special appellant, under the circumstances mentioned above, or that in every case under Section 14 of Act X of 1859, the Courts are debarred from fixing the rents payable by the ryot. A ryot, under this Section, may deny the right of the landlord to demand enhanced rent, and fail to prove his right to exemption; but he may, notwithstanding, ask for the proper enhanced rents being fixed in the case.

It is further argued that the present decision of the Lower Appellate Court does not shew that it has properly decided the question whether the plaintiff's tenure was, from its nature, exempt from enhancement; but this matter must have been disposed of by the Lower Appellate Court before it remanded the case to fix the proper rates of enhanced rents under the provisions of Section 17. We accordingly reject the special appeal without costs as no one appears for the respondent.

The 29th March 1865.

Present:

The Hon'ble G. Campbell and E. Jackson, *Judges.*

Jurisdiction—Suit for refund of rent.

Case No. 2897 of 1864 under Act X of 1859.

Special Appeal from a decision passed by the Additional Judge of East Burdwan, dated 17th July 1864, reversing a decision passed by the Deputy Collector of that District, dated the 30th January 1864.

Madhub Chunder Bidyarutton and others (Plaintiffs), *Appellants,*

versus

Tara Soondary Gooptanee and others (Defendants), *Respondents.*

Baboo Shamloll Mitter for Appellants.

Baboos Mohesh Chunder Chowdhry and *Doorgadoss Dutt* for Respondents.

No suit for refund of rent lies under Act X of 1859.

WE think it quite clear that there can be no such thing as a suit in the Revenue Court for refund of rent paid by a farmer three years before. The farmer might have refused to pay at the time; and in a suit for refund under Section 23, the question of right to abatement on account of diluvion might have been tried. But the present suit for rent cannot possibly lie in the Collector's Court; and we dismiss the appeal with cosst.

The 5th April 1865.

Present:

The Hon'ble W. Morgan and Shumboonath Pundit, *Judges.*

Presumption of occupancy from Permanent Settlement—Holding by a joint owner.

Cases Nos. 2795 to 2803 of 1864 under Act X of 1859.

Special Appeals from a decision passed by Mr. W. H. Brodhurst, Judge of Sarun, dated the 12th August 1864, *reversing a decision passed by the Deputy Collector of that District, dated the 25th February* 1864.

Roghoobun Tewaree (Plaintiff), *Appellant,*

versus

Bishen Dutt Dobey and others (Defendants), *Respondents.*

Baboos Mohindro Lal Shome and *Onoocool Chunder Mookerjee* for Appellant.

Baboos Debendro Narain Bose and *Greesh Chunder Ghose* and *Moulvie Murhumut Hossein* for Respondents.

A temporary arrangement among joint owners, by which one of their number is allowed to hold a portion of the joint property on payment of a certain sum of money does not convert the occupier into a ryot holding at a fixed rent, or entitle him to the benefit of the presumption under Section 4 Act X of 1859.

IN these nine cases, the plaintiff appeals from the decision of the Lower Court, dismissing his suits on the ground that the defendants having held the lands, the rents of which are now asked to be enhanced, at a uniform rent for 20 years, the plaintiff has no right to enhance. Now, it is admitted that the plaintiff and the defendants were joint-shareholders of the lands in dispute, and before the partition these lands were cultivated by the defendants by some mutual arrangement according to which each of these defendants was to pay some sum in money to the other shareholders for the right of occupying the lands respectively held by each. Subsequent to the butwarah, these lands fell to the share of the plaintiff; and the lands continuing to be held by the defendants, he has brought this suit to enhance the rents hitherto paid. A considerable portion of the period of 20 years of uniform payment is made up of the period preceding the butwarah.

Whether persons holding lands and paying rents under such circumstances are persons mentioned in Section 6 of Act X of 1859 as having no right of occupancy by holding nij jote lands let out year by year by the proprietor, is a different question; but we think that they are not within the class of ryots for whose benefit Section 4 of the Act was passed. If several joint owners, by arrangement among themselves, permit one of their number to hold a portion of the joint-property, paying a sum to the others, this arrangement does not convert the occupier into a ryot holding land at a particular rate of rent It is a temporary arrangement among the joint-owners of a particular time, and cannot, either in conjunction with or without a further holding such as is here shewn, be a basis for the presumption mentioned in the 4th Section of the Act.

The Court below having failed to try these cases on the merits, we remand them to that Court for trial.

The 6th April 1865.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Notice of enchancement (Service of)—Joint tenure.

Case No. 2928 of 1864 under Act X of 1859.

Special Appeal from a decision passed by the Judge of Beerbhoom, dated the 29th July 1864, *reversing a decision passed by*

the Deputy Collector of that District, dated the 14th June 1863.

Mothooranath Chatterjee (Plaintiff), *Appellant,*

versus

Khetturnath Biswas and others (Defendants), *Respondents.*

Baboos Onoocool Chunder Mookerjee, Greesh Chunder Ghose and *Debendro Narain Bose* for Appellant.

Baboo Banee Madhub Banerjee for Respondents.

In a case of joint tenure not sub-divided under any sanction from the superior landlord, notice of enhancement need not be served on all persons interested under an alleged sub-division.

IN this case, plaintiff, a purchaser of the putni, after his purchase, made a Mofussil measurement, and found the defendants in possession of an alleged ijmalee mokururee tenure. They were duly served with notice under Section 13 of Act X of 1859. They pleaded that tenure had been sub-divided among themselves by the holders of the mokururee, and that notice should have been served upon all having interests under such sub-division.

The first Court gave plaintiff a decree.

The Lower Appellate Court reversed this decision on the ground that all interested under the sub-division should have received notice.

The plaintiff appeals specially against this, urging that he is bound only to look to those whom he finds in his Register as his recorded tenants; that there is no dispute that the two defendants were his recorded tenants and had possession; that the tenure is a joint one, and it is never shewn to have been sub-divided under any sanction from the superior landlord; and that, therefore, the judgment of the Lower Appellate Court is incorrect.

We consider this objection valid, and remand the case for trial on the merits. As far as defendants who received the notice and are in possession of the joint-property are concerned, it is no valid defence to this suit to say that, although they had received notice, others have not. The defendants who received the notice must defend the suit on its merits, and not on such groundless technicalities as were pleaded successfully by them before the Lower Appellate Court.

Remand accordingly.

The 7th April 1865.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Presumption of occupancy before Permanent Settlement—Variation of rent.

Case No. 3103 of 1864 under Act X of 1859.

Special Appeal from a decision passed by Mr. F. B. Simpson, Judge of Jessore, dated the 5th August 1864, *affirming a decision passed by Baboo Kristo Beharee Mookerjee, Deputy Collector of that District, dated the 24th July* 1863.

Sumeeroodeen Lushkur (Defendant), *Appellant,*

versus

Huronath Roy and others (Plaintiffs), *Respondents.*

Baboo Poorno Chunder Mookerjee for Appellant.

Baboos Sreenath Doss and *Banee Madhub Banerjee* for Respondents.

Additional rent for additional land, and the addition of a small illegal cess, are not such variations of the proper rent as deprive the tenant of the presumption arising from 20 years' payment of uniform rent.

THIS was a suit for enhancement of rent. The Judge, confirming the Deputy Collector's decision has held that the presumption arising from 20 years' payment of rent at a fixed rate on the part of the tenant, has been rebutted by proof that the rent varied in the year 1800.

It is shewn, on special appeal, that this variation arose: *first* from a small increase to the extent of assessed land in defendant's possession; and *secondly*, from a cess of rupees 1-13 on account of Akhrajats. The respondent's vakeel contends that this would be a variation of the rent within the meaning of the law. But we consider that the additional rent for the additional land does not shew that the old rent for the old land had increased; and that the addition of a small illegal cess of rupees 1-13 is no such variation of the proper rent of the jumma as deprives the tenant of the presumption which the law would otherwise give him.

We reverse the judge's decision and dismiss the plaintiff's suit with costs.

The 8th April 1865.

Present :

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Suit for rent (against four defendants)—Proof of payment by one—Dismissal of rent as against all.

Case No. 3209 of 1864 under Act X of 1859.

Special Appeal from a decision passed by Mr. H. B. Lawford, Judge of Jessore, dated the 2nd August 1864, *reversing a decision passed by Baboo Kristo Behary Mookerjee, Deputy Collector of that District, dated the 23rd December* 1863.

Nillumber Mustophy (Plaintiff), *Appellant,*

versus

Doorgathurn Biswas and others (Defendants), *Respondents.*

Baboo Gopeenath Mookerjee for Appellant.

None for Respondent.

In a suit for rent brought against four persons, if one of them come forward and prove that he has paid the whole rent, the Judge is bound to dismiss the suit as against all the defendants.

The special appellant sued four person for rent. Two of them made no answer. A third came forward, and alleging himself to be the tenant, proved to the satisfaction of the Judge that he had paid the rent for the whole holding. The Judge accordingly dismissed plaintiff's case as against all the defendants It is said, on special appeal, that the Judge should have decreed the rent against the defendants who had not appeared. But we think that, as one of the defendants had proved that he had paid the whole rent, and that the plaintiff had accepted it from him, the Judge could not have passed any other order than that dismissing the suit.

Ths 21st April 1865.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Limitation (Sections 77 and 140 of Act X of 1859)— Suit for confirmation of possession.

Case No. 3450 of 1864.

Special Appeal from a decision passed by the Principal Sudder Ameen of Hooghly, dated the 26th August 1864, *affirming a decision passed by the Moonsiff of that District, dated the 16th December* 1863.

Sheikh Khairoollah and others (Plaintiffs), *Appellants,*

versus

Raj Kishen Mookerjee and others (Defendants), *Respondents.*

Baboo Khettur Mohun Mookerjee for Appellants.

Baboo Kisher Succa Mookerjee for Respondents.

The limitation prescribed by Sections 77 and 140 of Act X of 1859, does not apply to a suit brought in the Civil Court for confirmation of possession of certain land which formed the subject of a previous suit before the Collector, in which the same plaintiffs (after redeeming certain paddy crops on the same land in their occupation distrained for alleged arrears of rent), unsuccessfully sued to establish that no rent was due from them, and that the land in question was their own rent-free land.

SOME time before the institution of this suit, the present defendants distrained the paddy crops on certain land in the occupation of one Uladun Kazee and others in respect of alleged arrears of rent then due. Uladun Kazee and the others redeemed the paddy crops by duly depositing with the Collector the amount of the rent claimed, and instituting a suit in the Collector's Court to establish that no rent was due from them, and that the land in question was their own rent-free land. The Collector dismissed that suit, and confirmed the claim of the present defendants, and, on appeal, his decision was affirmed.

Subsequently to these proceedings, the present plaintiffs brought this suit, asking for confirmation of their possession of the same lands which formed the subject of the suit before the Collector, and alleging that they were, in fact, the real plaintiffs in that suit.

Upon this state of facts, the Court of first instance held that the limitation of time, prescribed alike by Sections 77 and 140 of Act X of 1859, applied to the case; and, therefore, as this suit was not brought within one year from the time of final decision of the suit before the Collector, the plaintiff's right to institute it was barred.

The Court of first instance accordingly dismissed the suit without entering upon the merits.

The Lower Appellate Court affirmed this decision, and, in addition thereto, to use the words of the English version of the Principal Sudder Ameen's judgment, a "determination of the points on the merits was "slightly made in the suit."

It was objected on special appeal before us that the Courts below were wrong in holding this case to be subject to the time of limitation prescribed by Sections 77 and 140 of Act X of 1859, and we are of opinion that this is so. Those Sections refer exclusively to cases where the Collector has before him one party who is admittedly a tenant to somebody, and two other parties who are each claiming to be the landlord of the first: under these circumstances, the Collector is bound to treat as actual landlord that one of the two rival claimants, who satisfies him that he has been *de facto*, immediately up to the time of the suit, in receipt of the rents and profits of the land; but his decision on this matter of fact is not to determine the rights of the disputing parties, provided they bring a suit in a Civil Court for the purpose of trying those rights within a specified period. It is obvious that the present plaintiffs, even if considered as having been, according to their own statement, the real plaintiffs in the suit before the Collector, never were in the situation of rivals to the defendants, disputing over a right to rent which the other party was admittedly bound to pay to one or the other of them. Consequently, the Sections in question have no application to this case.

We are of opinion that this suit is not barred by lapse of time; and we, therefore, remand it to the Lower Appel-

late Court for decision on the merits, inasmuch as we can only construe "a slight determination" of these to be no determination at all, such as the parties have a right to expect at the hands of a Court of Justice. We also remark that, if the Lower Appellate Court considers that the decision of the case by the Court of first instance on the preliminary issue alone has had the effect of rendering the evidence on the merits imperfect, it will be the duty of the Lower Appellate Court to remand the case to the Court below in accordance with the provisions of Section 351 of Act VIII of 1859.

The case is remanded for re-determination in accordance with the above observations.

The 24th April 1865.

Present:

The Hon'ble W. Morgan and Shumboonauth Pundit, *Judges.*

Suit for kubooleut—Tender of Pottah.

Case No. 3402 of 1864 under Act X of 1859.

Special Appeal from a decision passed by the Judge of the 24-Perganahs, dated the 27th August 1864, affirming a decision passed by the Deputy Collector of that District, dated the 31st May 1864.

Troylukhonath Chowdhry (Defendant), *Appellant,*

versus

Kuleema Bibee (Plaintiff), *Respondent.*

Baboo Anund Chunder Ghossal for Appellant.

Baboo Onocool Chunder Mookerjee for Respondent.

A suit cannot be maintained for a kubooleut without proof of previous tender of pottah.

THE terms of the law appear to us to be clear, and it has also been established by many decisions, that a suit cannot be maintained for a kubooleut, unless the plaintiff is able to shew a previous tender of a pottah.

In the present case, there is no allegation and no proof on the plaintiff's part of any tender of a pottah.

The special appeal is decreed with costs.

The 25th April 1865.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Limitation in rent cases—Act XIV of 1859—Interest (on arrears of rent).

Case No. 197 of 1864 under Act X of 1859.

Regular Appeal from a decision passed by the Deputy Collector of Nuddea, dated the 19th April 1864.

Mr. J. Mayer (Defendant), *Appellant,*

versus

Bibee Sowlutoonissa (Plaintiff), *Respondent.*

Messrs. R. T. Allan and *A. F. Lingham* for Appellant.

Mr. C. Gregory and *Baboo Debendur Narain Bose* for Respondent.

Section 14 Act XIV of 1859 does not apply to cases under Act X of 1859.

A tenant who, instead of paying his rent when due, compels his landlord to sue for it, is liable to pay interest thereon.

IN this case plaintiff sued on 21st March 1864 for arrears of rent as due by defendant to plaintiff from the 22nd Pous 1259 B. S. to 1270, with *interest.*

Defendant pleaded that the suit was barred by the Law of Limitation. Defendant also questioned the alleged extent of the plaintiff's proprietary rights, and the justice of plaintiff's demand for interest. Defendant further pleaded a pottah as one which had been found valid by the High Court on 18th August 1863 and which fixed the rates.

It may be here remarked that plaintiff had previously sued in February 1860 for possession of the land with mesne profits, and for the cancellation of the defendant's pottah. The final result of that suit was that the High Court, on 18th August 1863, upheld defendant's pottah; and this decision it is which, plaintiff specifically states in his plaint, gives him his cause of action in the present suit for arrears of rent from 1259 to 1270 B. S.

On these pleadings, and on the evidence adduced in support of them, the Lower Court has held that, as plaintiff was suing from February 1860 to the 18th August 1863, he was, during that period, under legal disability to file any suit for arrears of rent. The Deputy Collector adds—"the case seems clearly to fall under Section 14 of the Limitation Act" (XIV of 1859). The Deputy Collector, then, holding the

suit not to be subject to the bar of limitation, goes into the merits, and gives a decree for the arrears of rent sued for, and in accordance with defendant's pottah. The Deputy Collector also decreed interest, he considered that that defendant did not pay the arrears due till he had compelled plaintiff to sue for them.

Defendant appeals on the points of *limitation* and *interest*.

Upon the first point (limitation) he cites the decison of five Judges of this Court, dated the 18th of January 1865, page 21, "Act X Rulings," Weekly Reporter, Volume II. We observe that it was there clearly and definitively ruled that Section 14 Act XIV of 1859, on which the Deputy Collector has relied, did not apply to cases under Act X of 1859. We hold, then, that, the appellant's objection on the point of limitation is valid; but we think it just to the Deputy Collector to observe that his decision was of date anterior to the ruling of this Court above adverted to.

The respondent's pleader refers us to another case in page 51 of the work above quoted. But it is *not* analogous; for that was a case where the suit was for declaration of a right to *enhance*, and the question was whether a party could sue for specified rents till such right to *enhance* was declared. Here the rents sued for were fully known before the suit was brought. Section 32 Act X of 1859 enacts that suits for the recovery of arrears of rent *shall* be instituted within three years from *the last day* of the Bengal year, in which the arrear claimed shall have become due. Now, the suit was instituted on the 8th Chóitro 1270 (21st March 1864), and the last day of the Bengal year was 30th Choitro 1270 B. S., or 10th April 1864. Thus the arrear claimed as for 1270 does not fall within this suit.

We, therefore, decree to plaintiff the rents for 1267, 1268, and 1269, which could be sued for according to the above law when the suit was brought. We think with the Lower Court, that defendant, appellant, should have paid his rent now decreed, when due; and as he did not do so, and plaintiff was kept out of the use of his money, interest for those three years should be decreed to plaintiff. We, therefore, decree the appeal to the extent specified with costs in proportion, that is, plaintiff will pay defendant's costs except proportionately in respect to the rents, with interest, for 1267, 1268, and 1269 B. S.

The 29th March 1865.

Present:

The Hon'ble W. Morgan and Shumboonath Pundit, *Judges.*

Evidence—Production of forged document by a party.

Case No. 2918 of 1864 under Act X of 1859

Special Appeal from a decision passed by the Additional Judge of Jessore, dated the 26th July 1864, *reversing a decision of the Deputy Collector of that District, dated the 7th December* 1863.

Goriboolla Gazee and others (Defendant), *Appellants,*

versus

Gooroodoss Roy (Plaintiff), *Respondent.*

Baboo Kally Kishen Sein for Appellants.

The production in evidence of a forged document by a party to a suit does not relieve the Court from the duty of examining the whole evidence adduced on both sides, and of deciding the case according to the truth of the matters in issue.

THE defendants, who are ryots sued under Act X of 1859 for enhancement of rent, claim to be exempt from enhancement, because they held under a mourossee pottah granted to them before the Permanent Settlement. They gave evidence to prove that the rent paid by them had not been changed for 20 years before the commencement of the suit, and if this evidence was credible, and they had rested their case on this evidence alone, they might have claimed the benefit of the presumption (enacted by the 4th Section) that the land had been held at the rent shown from the time of the Permanent Settlement, and was therefore land which they had no right to hold at a fixed rate of rent. This presumption from a uniform payment of rent for 20 year stands "unless the contrary be shown;" and the only question in the present special appeal is whether the Judge rightly held that the presumption thus enacted in the ryot's favor was rebutted or ought not to prevail in this case by reason of the other matters shown in evidence.

No direct evidence was adduced to show that the land had not been held at the same rent from the time of the Permanent Settlement. But the defendants, in support of their alleged mourossee pottah, give in evidence a writing, bearing date the 16th Pous 1198 B. E., and purporting to be a confirmation of a former pottah granted to an ancestor of the defendants. The Judge pronounced this document to be fabricated, both from its appearance, and also because it was proved that, at the date of this alleged confirmation, the plaintiff's grandfather, the person supposed to grant it, was a minor whose estate was then under the charge of the Court of Wards. The judgment of the Court upon this part of the case is in the following words:—"The defendants have "proved that they have held this land at a "uniform rate for a period of 20 years; but "as the pottah under which they claim to "have held, is proved to be false, it cannot "now be assumed that they have held at "that rate since the Permanent Settlement."

The Judge is not correct in stating that the *pottah* is proved to be false, the paper produced being not a pottah but a writing confirming a previous pottah. The Judge being satisfied that the writing was a fabrication, and as it would seem a fabrication of recent date, and therefore within the defendants' knowledge, a presumption arose against the truth of the case advanced by the defendants, which was, that they held at a fixed rent under a mourossee pottah of ancient date. If the Court, in weighing the whole evidence, has given no more than due effect and weight to this presumption arising from the use of evidence known by the persons using it to be fabricated, we cannot interfere. If, on the other hand, the Court, finding that a fabricated paper has been adduced in evidence by the defendants, had regarded this mal-practice as a thing necessarily destructive of the defendants' case, and of the presumption which the 4th Section enacts, the judgment is erroneous. The Judge's language, if it is not meant to express this latter view, lead us to doubt whether he has not attached an artificial and undue weight to the fact of the defendants having used the fabricated paper in evidence; and as there is also a misapprehension in the judgment as to the precise character of the document itself, we shall, on these grounds, remand the case to the Lower Appellate Court for a new trial.

The Court will bear in mind that the use of fabricated written evidence by a party, however clearly established, does not relieve the Court from the duty of examining the whole of the evidence adduced on both sides, and of deciding according to the truth the matters in issue. The person using such evidence may have brought himself within the penalties of the Criminal Law; but the Court should not, in a Civil suit, inflict a punishment under the name of a presumption.

Forgery or fraud in some material part of the evidence, if it is shown to be the contrivance of a party to the proceedings, may afford a fair presumption against the whole of the evidence adduced by that party, or at least against such portion of that evidence as tends to the same conclusion with the fabricated evidence. It may perhaps also have the further effect of gaining a more ready admission for the evidence of his opponents. But the presumption should not be pressed too far, especially in this country, where it happens, not uncommonly, that falsehood and fabrication are employed to support a just cause.

In a recent appeal heard by the Privy Council, Ranee Shurnomoyee *vs.* Maharajah Suttee Chunder Roy Bahadoor, 23rd July 1864, their Lordships sustained the appeal, although they treated the whole of the parole evidence of the appellant as unworthy of credit, and a confirmatory pottah produced by her as a forged instrument. In the judgment it is said "that, when false "witnesses or forged documents are produced in support of a case, the fact naturally "creates suspicion as to the case itself; and "if the evidence on which their Lordships "act depended in any decree for its credibility or weight on such witnesses or documents, they would have paused as to "their conclusion. The fact is not so, however, in the present case; their Lordships "believe they have to deal with a just case "foolishly and wickedly attempted to be "supported by false evidence. This misconduct must not mislead them in the advice they will have to tender to Her Majesty, which will be that the appeal be sustained and the decrees complained of reversed."

In the present suit the defendants have failed to prove the mourossee pottah on which they based their right to hold the land at a fixed rent, and they have knowingly put in evidence in support of the alleged pottah, a writing which the Court is satisfied is a fabrication. If the Court nevertheless, credits the evidence offered by them to show payment of rent at an unvarying rate for the last 20 years, effect may be given to the presumption which the 4th Section declares shall arise "unless the contrary be shown, or "unless it be proved that such rent was fixed "at some later period" than the time of the Permanent Settlement. On the other hand the presumption from the use of the fabricated writing must have due weight. It is for the Court, weighing the whole evidence, to say what inference is fairly to be deduced from this fact, whether it is merely that no such mourossee pottah ever existed as the defendants have put forward, or whether it goes further and satisfies the Court that the defendants are not persons who have long held the land at fixed rates of rent. The Court will draw such presumption from the fact as is fair and reasonable. The main ground of our interference with the present finding is that which we have already stated, *viz.*, an apprehension that the Court has given an artificial and undue effect to this presumption.

The 25th April 1865.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Jurisdiction—Ejectment (of one royt by another).

Case No. 2826 of 1864.

Special Appeal from a decision passed by the Deputy Commissioner of Gowalparah, dated the 22nd July 1864, *affirming an order passed by the Sudder Ameen of that District, dated the 28th March* 1864.

Teeluck Chand Oswal (Defendant), *Appellant,*

versus

Gour Chunder Shaha (Plaintiff), *Respondent.*

Baboo Mohinee Mohun Roy for Appellant.

Baboo Debendro Narain Bose for Respondent.

Where the dispossession of one ryot by another is not the direct act of the zemindar, the case is cognizable by the Civil Court.

THE plaintiff alleged that he had been dispossessed of his jote by another ryot in consequence of a pottah obtained by the latter from the tehsildar of the zemindar, and he sued in the Civil Court. It is con-

tended that he should have gone under Act X. We have considerable doubts on the subject, and should like to see some broad principle laid down by which the jurisdiction in these cases should be regulated otherwise than by reference to the exact wording and form of the suit. But as it seems to have been decided in several cases that, when the dispossession is not the direct and immediate act of the zemindar (and in this case, it is not shewn that it was the direct act of the zemindar), we do not think that there is in the present instance sufficient ground for interference, and we dismiss the appeal with costs.

The 25th April 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Survey and measurement of lands—Remedy of neighbouring zemindar.

Case No. 21 of 1865.

Miscellaneous Appeal from an order passed by the Judge of Tirhoot, dated the 9th September 1864, *affirming an order passed by the Deputy Collector of that District, dated the 13th August* 1863.

Baboo Purmessuree Pershad Narain Singh (Objector), *Appellant,*

versus

Sheikh Nubee Buksh (Plaintiff), *Respondent.*

Baboos Mohesh Chunder Chowdhry and *Kissen Succa Mookerjee* for Appellant.

Mr. A. F. Lingham for Respondent.

Sections 9 and 10 Act VI of 1862, B. C., do not embrace the case of a neighbouring zemindar alleging to be wronged by the act of the Collector or the measuring zemindar. His remedy is in a separate Civil action.

AFTER hearing the pleader for the appellant, we do not think that he has any *locus standi* in Court. Sections 9 and 10 of Act VI of 1862 (Bengal Council) are wholly taken up with the survey and measurement of lands as between a zemindar and his ryot. Those provisions do not embrace the case of a neighbouring zemindar objecting to any encroachment.

We observe, too, that even if there had been a place in Court for the appellant, he made no appearance until the case had been decided and put aside.

But, on the first point noticed, *viz.*, the want of any provision in Sections 9 and 10, we think the appellant is out of Court. If he has been wronged by the act of the Collector, or of the measuring zemindar, the appellant will, no doubt, have his remedy in a separate Civil action.

Appeal dismissed with costs.

The 26th April 1865.

Present:

The Hon'ble F. A. Glover and A. G. Macpherson, *Judges.*

Section 25 Act X of 1859—Ejectment—Breach of contract.

Case No. 3454 of 1864 under Act X of 1859.

Special Appeal from a decision passed by the Judge of Tirhoot, dated the 1st August 1864, *affirming a decision passed by the Deputy Collector of that District, dated the 9th January* 1864.

Augur Singh (Plaintiff), *Appellant,*

versus

Mohinee Dutt Singh and another (Defendants), *Respondents.*

Baboo Roopnath Banerjee for Appellant.

Baboo Bama Churn Banerjee for Respondents.

The proviso in Section 25 of Act X of 1859 is limited to applications for ejectment "on the determination of a lease."

In the absence of a provision for the cancelment of a lease or that the landlord shall have the right of re-entry on breach of any of the stipulations in the lease, a breach does not cancel the lease or give a right to eject.

THE appellant sued to cancel a lease (under Clause 5 of Section 23 of Act X of 1859) in consequence of a breach of contract on the part of the ryot, the respondent. The Lower Court held that under Section 25 of Act X, the appellant could attain his object only by a regular suit in the Civil Court, because the lease was a zur-i-peshgee lease, and, therefore, the matter was not cognizable in the Revenue Courts.

We think that the Court was wrong in holding that this suit fell under the proviso in Section 25. That proviso is limited to applications for ejectment "on the determination of a lease," and it was, therefore, inapplicable to this suit which was not an application for ejectment "*on the determination of a lease.*" But we think it unneces-

sary to remand the case to the Lower Court, because, although that Court has jurisdiction, the appellant's suit, if tried must necessarily have been dismissed. He sues to annul the lease on account of a breach of a contract contained in it. But the lease contains no provisothat it shall be cancelled, or that the landlord shall have the right of re-entry on breach of any of the conditions of it; and in the absence of such a proviso, a breach of contract does not cancel the lease or give a right to eject. (See the case of *Goroo Pershad Sircar*, March 9th 1863, Hay & Co.'s Reports, Volume II, page 451.)

The 26th April 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Lakheraj—Resumption—Jurisdiction.

Cases Nos. 825 and 826 of 1863.

Special Appeals from a decision psased by the Judge of Sarun, dated the 31st December 1862, affirming a decision passed by the Collector of that District, dated the 19th April 1862.

Rajah Roy and others (Defendants), *Appellants,*

versus

Bibee Oomutbutool and others (Plaintiffs), *Respondents.*

Mr. R. T. Allan and *Baboos Kishen Succa Mookerjee* and *Kalee Kishen Sein* for Appellants.

Messrs. C. Gregory and *J. Baptist*, and *Baboo Roop Nauth Banerjee* and *Debendro Narain Bose*, *Moonshee Ameer Alee*, and *Moulvie Aftaboodeen Mahomed* for Respondents.

A zemindar having failed in a suit brought in the Revenue Court under Section 28 Act X of 1859, to resume lands as forming part of his permanently settled estate, cannot sue in the Civil Court to try the same question over again, though he may sue in the Civil Court under Regulation II of 1819 to try the validity of the defendant's title to hold the lands rent-free.

In these cases, the plaintiff has brought a suit to resume lands as forming part of his permanently settled estate, and has obtained a decree in the Lower Courts. In special appeal it is urged that the plaintiff first went before the Collector and tried this question under Section 28 of Act X of 1859, and, having failed there, brought the present suit in the Civil Court to try the same question over again.

We find that the plaintiff did, as alleged by the special appellant, file a suit under Section 28 Act X of 1859, and failed to adduce any proof that the lands in question were lands of his permanently settled estate, while, from the evidence adduced by the defendant, the Deputy Collector came to the conclusion that the tenure was in existence, as lakheraj, before 1790, and, therefore, as directed by a Circular Order of the Board of Revenue, he abstained from disposing of the case under Section 28, and referred the plaintiff to a resumption suit under Regulation II of 1819. Plaintiff brought forward the claim, already disposed of by the Deputy Collector, in the Civil Court, calling it a suit under Section 30 of Regulation II of 1819, which it is not. As the High Court, in its ruling in the case of Sonaton Ghose, appellant, No. 869, has held that the Civil Courts and the Collector have concurrent jurisdiction as to the trial of suits regarding lands held on invalid rent-free grants subsequent to 1790, it is evident that a party cannot first select one Court to institute a suit, and having failed there, proceed to institute another suit to try the same question in another Court of concurrent jurisdiction. Having failed in the Collector's Court to prove that the lands were alienated subsequent to 1790, plaintiff might, as indicated by the Deputy Collector, have instituted a suit to try the validity of the defendant's title to hold these lands rent-free, and he may do so still under the provisions of Regulation II of 1819: but his present suit must be dismissed. We decree the appeal with costs, and reversing the orders of the Lower Courts, dismiss the plaintiff's suit.

The 26th April 1865.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Lease—Kubooleut—Possession—Presumption—Evidence.

Case No. 2906 of 1864 under Act X of 1859.

Special Appeal from a decision passed by the Additional Judge of Bhaugulpore, dated the 22nd August 1864, reversing a decision passed by the Collector of that District, dated the 25th May 1864.

Mrs. Douzelli and others (Defendants), *Appellants*,

versus

Rajah Tek Narain Singh (Plaintiff), *Respondent*.

Mr. G. C. Paul and *Baboo Mohinee Mohun Roy* for Appellants.

Baboo Debendro Narain Bose for Respondent.

When a zemindar gives a lease, the presumption is that he is in a position to give possession of the property leased. After the execution of the kubooleut strong evidence is requisite to show that possession was not given to the party executing it.

PLAINTIEF sued defendant for the rents of 1268 and 1269, due under a kubooleut extending over 3 annas 4 gundas of a certain village.

The defendant admits the execution, but pleads that, at the time of granting him the lease the plaintiff was not in possession, and that he was ever since been obstructed in obtaining possession by Gourdyal Moonshee, the owner of 12 annas of the property.

The first Court dismissed the plaintiff's claim, and the Judge, on appeal, decreed it. Defendant now appeals specially, urging, 1*st*. That it was a condition precedent to the realizing of rent from him that there should be measurement of the village; and 2*nd*. That the Judge in a very perfunctory manner enquired into the question of his possession.

We think that the enquiry of the Judge is not at all satisfactory. When a zemindar gives a lease to any party, it is to be presumed that he is in a position to give him possession of the property leased; and after the execution of the kuboolent, strong evidence is requisite in order to show that possession was not given to the party executing it. In the present case, evidence of that nature has not been required or given. We, therefore, remit the case to the Judge for the purpose of his enquiry—1*st*. Whether defendant immediately after the execution of the kuboolent obtained possession or not? If he did, and if he lost it afterwards, the responsibility is on him. If, however, he did not obtain possession immediately, the 2*nd* issue will be, whether during the years 1267 and 1268, Gourdyal, by the receipt of the rents, prevented his obtaining possession of the property leased to him; if Gourdyal did so prevent him, the plaintiff's suit must be dismissed; if he did not, the suit of the plaintiff should be decreed. The Judge, in making this investigation, will carefully examine the evidence, both documentary and oral put before him.

The 27th April 1865.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges*.

Jurisdiction—Suit for declaration of title to rents in Civil Court—Prior suit for rent in Revenue Court.

Case No. 3452 of 1864.

Special Appeal from a decision passed by the Principal Sudder Ameen of Jessore, dated the 3rd September 1864, *reversing a decision passed by the Moonsiff of that District, dated the 2nd February* 1863.

Dhurony Mojoomdar (Plaintiff), *Appellant*,

versus

Bissambhur Mookerjee and others (Defendants), *Respondents*.

Baboos Anund Chunder Ghossal and *Opprokash Chunder Mookerjee* for Appellant.

Baboos Onoocool Chunder Mookerjee and *Otool Chunder Mookerjee* for Respondents.

The dismissal of a suit for rent in the Revenue Court for want of jurisdiction (the plaintiff not having proved that he was *de facto* landlord in possession) does not bar a suit in the Civil Court for declaration of right to the same rent.

THIS suit was brought for declaration of right and for mesne profits, *viz*., the rents due from certain tenants. Plaintiff had previously sued those tenants for the same sum as rents under Act X of 1859, and that suit had been dismissed on failure by plaintiff to prove that he was the real landlord and had before received rents, the present defendant then appearing as inter venor. In other words the Revenue Courts, under these circumstances, had no jurisdiction.

Plaintiff in this case avers his right under a mourosee pottah from defendant, Bissambhur, the ganteedar, and that defendant (Bissambhur) denies ever having given such a pottа to plaintiff.

The first Court held that plaintiff had sufficiently proved that he had been in possession of his 4 annas share under his alleged mourosee pottah, and that that pottah was genuine. It accordingly gave plaintiff a decree, declaring his right to a 4 annas share of the mourosee, and to mesne profits in the shape of rents, the amount of which was to be ascertained in execution.

On appeal the Principal Sudder Ameen held that the suit could not lie in the Civil Court, as the declaration of right sued for by plaintiff could only be decreed when possession and receipt of rents were shewn; but that here plaintiff did not prove these facts, while also he sued for the same thing under the name of mesne profit, *viz.*, arrears of rent, for which his claim under Act X of 1859 had been dismissed, on the very ground of his failing to prove these facts. The Principal Sudder Ameen added that, if plaintiff wanted possession from his superior landlord (defendant) who denied his title, he should have so sued, and not as he has; and that the suing now for declaration of right and mesne profits was a mere pretext to obtain in a Civil Court precisely that which had been denied him in the Revenue Court in his suit for arrears of rent. The Principal Sudder Ameen also rejected a plea raised in oral argument by plaintiff's pleader that this was a regular suit under the provisions of Section 77 Act X of 1859, holding that such cases could only arise where the Revenue Court had held that the defendant, intervenor, had been in possession and in receipt of rent, which was not so held there in this case.

The Principal Sudder Ameen having accordingly dismissed plaintiff's case, plaintiff appeals here specially, urging that the suit was for declaration of title and for mesne profits, *i. e.*, rents collected, and could lie; the claim to such rents not having been gone into in the suit under Act X of 1859, the Revenue Court merely holding it had no jurisdiction.

We think that the suit in the Collector's Court was dismissed, because plaintiff did not show himself to be *de facto* landlord in possession, and, therefore, that Court had no *jurisdiction;* consequently, the right to the rent has not ever been tried. Thus there seems no reason why the declaration of right to rents for the future should not be asked for in the Civil Courts.

We, accordingly, decree the appeal with costs.

The 3rd May 1865.

Present:

The Hon'ble C. B. Trevor and G. Campbell, *Judges.*

Suit for kubooleut (against rival landlord).

Cases Nos. 3111 and 3112 of 1864 under Act X of 1859.

Special Appeals from a decision passed by the Additional Judge of Chittagong, dated the 5th July 1864, *affirming a decision passed by the Deputy Collector of that District, dated the 29th September* 1863.

Chundee Churn Doss (one of the Defendants), *Appellants,*

versus

Dataram Chowdhry (Plaintiff), and others (Defendants), *Respondents.*

Baboos Kishen Succa Mookerjee and *Greeja-Sunker Mojoomdar* for Appellants.

Baboo Debendro Narain Bose for Respondents.

No suit for a kubooleut can lie under Act X of 1859 against a rival landlord.

PLAINTIFF in these two cases sues a defendant as ryot of his own for a kubooleut for the first time for certain julkur.

The defendant answered that the julkur, for which the kubooleut is now for the first time required, is within the turuf estate of Chundee Churn Doss, to whom he pays rent.

The defendant, Chundee Churn Doss, claims the land as his own.

The Additional Judge released the ryot, defendant, but gave the plaintiff a decree for kubooleuts against Chundee Churn Doss.

Chundee Churn Doss now appeals specially urging that until the question of title between himself and plaintiff, the farmer of Nowabad land, is determined, no suit for a kubooleut can lie against him under Act X of 1859.

We think that the proceedings of the Additional Judge are altogether illegal. The present case stands as a dismissal of the plaintiff's claim against the ryot, defendants; but it is altogether null and void as against Chundee Churn Doss, and will be no bar to suits brought by either party to prove their title to the land in dispute. The costs of this special appeal will be borne under the circumstances by the parties respectively.

The 4th May 1865.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Jurisdiction—Suit for possession (against co-lessees in collusion with zemindar).

Case No. 3474 of 1864.

Special Appeal from a decision passed by the Additional Judge of Dacca, dated the 5th September 1864, *affirming a decision passed by the Judge of the small Cause Court with powers of the Principal Sudder Ameen of that District, dated the 27th March* 1863.

Shumbhoonath Shaha (one of the Defendants), *Appellant,*

versus

Ram Sundar Sircar (Plaintiff), and others (Defendants), *Respondents.*

Baboo Romesh Chunder Mitter for Appellant.

Baboo Mohinee Mohun Roy for Respondents.

A suit for possession, brought in reality by one lessee against the other lessees as co-parceners in collusion with the zemindar, and not against the zemindar as landlord, is rightly brought in the Civil Court, and not before the Collector under Clause 6 Section 23 Act X of 1859.

THE first plea is that the Civil Court had no jurisdiction, as plaintiff sued the zemindar and other lessees for possession, and thus the suit should have been in the Collector's Court under Clause 6 Section 23 Act X of 1859. But we find that the suit is really against the other lessees as the co-parceners of the plaintiff acting in collusion with the zemindar, and not against the latter in the relation of landlord and tenant contemplated in the Clause and Section cited.

We therefore over-rule this plea.

The other arguments are really against the finding of fact by the Judge, which is that the plaintiff's lease and previous possession give him a title to recover the land from the defendants who have ousted him.

Dismissed with costs.

The 8th May 1865

Present:

The Hon'ble W. Morgan and Shumbhoonath Pundit, *Judges.*

Jurisdiction—Suit for rents embezzled.

Case No. 3491 of 1864 under Act X of 1859.

Special Appeal from a decision passed by the Judge of Beerbhoom, dated the 8th September 1864, *reversing a decision passed by the Deputy Collector of that District, dated the 11th June* 1864.

Messrs. R. Skinner & Co. (Plaintiffs), *Appellants,*

versus

Rujub Ali Khan and another (Defendants), *Respondents.*

Baboo Banee Madhub Banerjee for Appellants.

None for Respondents.

An agent may be sued under Act X of 1859 for rents received by him, whether or not he has committed, with respect to such rents, an offence under the Penal Law.

THE Lower Appellate Court holds that the plaintiff having charged the defendant with what amounts to 'embezzlement,' the plaintiff's claim to recover the sum sued for, is not cognizable under the Rent Law. This decision is wrong. The defendant, a gomashtah employed to collect rents, is sued for sums collected by him, and not duly paid over or accounted for to his employer. Whether he has committed, with respect to the monies (if any) so retained by him, an offence within the Penal Law or not, his Civil liability still continues, and the plaintiff's suit is clearly maintainable.

We reverse the Judge's decision as to this part of the case only. The Judge will hear the evidence and determine whether the defendant is liable for any and what sum in respect of his collections which have not been duly paid over, or accounted for, to the plaintiff.

The 8th May 1865.

Present:

The Hon'ble W. Morgan and Shumboonath Pundit, *Judges.*

Jurisdiction—Suit to recover Government jumma agreed to be paid between date of resumption and settlement.

Case No. 3330 of 1864.

Special Appeal from a decision passed by the Judge of Beerbhoom, dated the 2nd August 1864, *affirming a decision passed by the Principal Sudder Ameen of that District, dated the 10th February* 1864.

The Government (Plaintiff), *Appellant,*

versus

Hushumtoonissa Bibee and others (Defendants), *Respondents.*

Baboo Kishen Kishore Ghose for Appellant.
None for Respondents.

A suit by Government to recover what the defendants have by a writing agreed to pay in respect of Government jumma between the date of resumption and settlement, is not a suit for arrears of rent cognizable by the Collector under Act X of 1859.

THE plaint has been rejected by both Courts, on the ground that this suit is one cognizable by the Collector's Court alone under Act X of 1859, as a suit for arrears of rent.

The suit is by the Government for money due. It is not a suit for arrears of rent. The resumed lakheraj in respect of which the claim arises was resumed so far back as the year 1839. From some difficulty in identifying or precisely ascertaining the lands, a settlement was not made until the year 1859. The present suit is for a sum claimed by the Government in respect of its demand between the date of resumtion and the settlement. It is alleged in the plaint that that sum accrued to the Government being due according to a petition of the defendants filed on the 23rd Assin 1268, which they undertook to pay that sum. This is not a suit for arrears of rent, but a suit by the Government to recover the sum which the defendants have agreed to pay in respect of the claim of Government to its jumma for the period prior to the settlement of 1859. It is not a case within the Collector's jurisdiction, but is properly cognizable in the Civil Courts, and must be heard there.

The special appeal is allowed with costs.

The 4th January 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr,
Puisne Judges.

Limitation (to what cases Section 14 Act XIV of 1859 applicable)—Execution of decree (Time for).

Case No. 382 of 1864.

Miscellaneous Appeal from an order passed by the Judge of Mymensingh, dated the 31st May 1864, affirming an order passed by the Principal Sudder Ameen of that District, dated the 19th January 1864.

Kalee Chunder Chowdhry, *Petitioner,*

versus

Ruttun Gopal Bhadooree and others,
Opposite party.

Baboos Onoocool Chunder Mookerjee and *Opprokash Chunder Mookerjee* for Petitioner.

Baboos Sreenath Doss and *Romesh Chunder Mitter* for Opposite party.

Section 14 Act XIV of 1859 does not apply to cases in which the right of the petitioner has been judicially determined, but to suits in which no judgment has been given, but which through error have been *bonâ fide* instituted in a Court not having jurisdiction.

Execution of a decree should be taken out from the date of the passing, and not from the date of the commencement, of that Act.

Two objections have been taken to the decision below—1st, that Section 14 Act XIV of 1859 is applicable to the present case; and 2nd, that the Judge was wrong in holding that execution of the decree should have been taken out from the date of the passing of the Act, and not from the date on which it was subsequently declared to have effect.

On the first point, we find that, somewhere in or about 1855, the petitioner sued for enhanced rents, after notice served under the provisions of Regulation V of 1812, and obtained a decree declaring him entitled to enhance the rent. His course then was to serve a notice on the defendant and to recover at the rates mentioned in the notice, leaving the tenant to contest the fairness or otherwise of the rent demanded. Instead of doing this, the petitioner, two years subsequently, instituted a fresh suit in another Court to assess the lands. This suit was dismissed on appeal by the Judge, who held that petitioner was again suing for a remedy which he might have enforced under the decree already obtained by him, and this decision was confirmed on appeal by the High Court on 23rd June 1863. Petitioner then came into Court on 20th August 1863, and prayed that he might then be allowed to execute his decree of 1855, urging that Section 14 Act XIV of 1859 would give him a standing in Court, even if he were otherwise barred by the law of limitation. This Section the Judge has held not to be applicable to the case, and we agree with the Judge on this point, for Section 14 appears to us not to contemplate a case such as this. It refers to suits in which no judgment has been given, but which through error have been *bonâ fide* instituted in a Court not having jurisdiction, and have been consequently thrown out. In such cases, the law says that a party, acting in ignorance but in good faith, shall not be a loser. In the present case, the right of the petitioner had been judicially declared; the remedy that he sought had been given him, and so there was no ground for going into Court.

On the second point we see that the Judge has decided in conformity with several decisions of this Court, and we, therefore, find no grounds for interfering with the orders passed below.

The appeal is rejected with costs.

The 4th January 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr,
Puisne Judges.

Sales (in Execution of decree)—Application to set aside for irregularity.

Case No. 413 of 1864.

Miscellaneous Appeal from an order passed by the Judge of Sylhet, dated the 28th May 1864, affirming an order passed by

the Principal Sudder Ameen of that District, dated the 13*th April* 1864.

Joy Tara Dossee, mother of Kaleenath Doss, *Petitioner,*

versus

Mahomed Hossein and another, *Opposite party.*

Baboo Poorno Chunder Mookerjee for Petitioner.

None for Opposite party.

Even where material irregularity has ensued from non-issue of proclamation of sale in execution of a decree, the person applying to set aside the sale on that ground is bound, under Section 256, Act VIII of 1859, to prove substantial injury arising thereby.

NEITHER of the Courts have treated this case as they should have treated it.

On the objection of the debtor, the judgment-holder should have produced, or the Court itself should have taken, evidence as to whether the second proclamation was really issued.

If it were really issued, there is an end of the petitioner's appeal. If it were not issued, and material irregularity has thereby ensued, still, under Section 256 of the Civil Code, the applicant would be bound to prove that she had sustained substantail injury owing to the irregularity. The case must be remanded to the Principal Sudder Ameen, who will himself take the necessary or the proffered evidence on these points. If, as already remarked, the second proclamation was issued, the sale will stand good If it did not issue, it will still be on the appellant to prove substantial injury arising out of this defect; and the Principal Sudder Ameen will decide the case accordingly.

The 4th January 1865.

Present :

The Hon'ble G. Loch and W. S. Seton-Karr, *Puisne Judges.*

Plea of final release by debtor—Date of.

Cases Nos. 491 and 513 of 1864.

Miscellaneous Appeal from an order passed by Baboo Goopeenauth Bose, Acting Principal Sudder Ameen of Nuddea, dated the 31*st August* 1864.

Brindabun Chunder Sircar Chowdhry and another, *Petitioners,*

versus

Khoshal Chunder Dutt, *Opposite party.*

Baboos Romanath Bose and *Tarucknath Sein* for Petitioners.

Baboos Banee Madhub Banerjee and *Kedarnath Chatterjee* for Opposite party.

A debtor who pleads a final release should be called upon to state the date of the alleged arrangement. If the date be subsequent to Act VIII of 1859, the decree should be allowed to proceed, as Section 206 forbids the recognition of adjustments not made through Courts. If prior to that Act, the *bonâ fides* of the adjustment must be considered.

THE Principal Sudder Ameen has missed the point raised by the judgment-debtor in these cases, and which, as argued by the judgment-holder, ought to have been decided.

The debtor pleaded a final release, and the Court should have called on him to state when this alleged arrangement took place. If it bears date subsequent to Act VIII of 1859, the decree should have been allowed to proceed, inasmuch as Section 206 forbids Courts to recognize any adjustments not made through the Court.

If the said date be prior to Act VIII, then the Court will simply have to consider the *bonâ fides* of the adjustment, and decide the case accordingly. To dismiss the decree-holder's petition, because he had not appeared to give evidence, was, in this view, wholly beside the point at issue.

The cases are remanded to the lower Court for a trial, with reference to the above remarks.

The 9th January 1865.

Present :

The Hon'ble G. Loch and W. S. Seton-Karr, *Puisne Judges.*

Limitation—Execution (Revival of).

Case No. 435 of 1864.

Miscellaneous Appeals from an order passed by the Principal Sudder Ameen of Rungpore, dated the 2*nd June* 1864.

Gour Monee Dossee and others, *Petitioners,*

versus

Jugutendro Narain Chowdhry and others, *Opposite party.*

Baboos Dwarkanath Mitter and *Unnoda Pershad Banerjee* for Petitioners.

Baboos Sreenath Doss and *Kishen Dyal Roy* for Opposite party.

No. 498 of 1864.

Jugutendro Narain Chowdhry, *Petitioner,*

versus

Gour Monee Dossee and others,
Opposite party.

Baboos Hem Chunder Banerjee and *Sreenath Doss* for Petitioner.

Baboos Dwarkanauth Mitter and *Unnoda Pershad Banerjee* for Opposite party.

The application for revival of execution of decree was made to the Principal Sudder Ameen in January 1862. The Judge's permission for the Principal Sudder Ameen to try the case, was asked for and given in June 1864. HELD that the sanction of the Judge legalized all the previous acts of the Principal Sudder Ameen; and that, in this view, execution was revived before expiry of the three years allowed by Act XIV of 1859.

THERE are two appeals in this case. The debtors appeal against that part of the order which allows the heir of Mehendro Narain to take out execution through his guardian, and the heirs of Bhyrub Chunder appeal against their exclusion from the benefit of the decree.

After hearing both sides fully, and after reference to the various Sections of Act XIV of 1859 which bear on the subject, we find the whole contention narrowed to this, *viz.*, it being clearly shown that execution was taken out by both Mohendro and Bhyrub in 1854, and money recovered, does the application to the Principal Sudder Ameen in January 1862 keep alive the decree within the meaning of the Act in question, or does the revival, in fact, only bear date from June 1864? In the former supposition, the decree would be in force and in time; and in the latter, it would not.

Now, it seems that the Principal Sudder Ameen would not have had the right to try such a case, until it was given him by the Judge; and the Judge's permission was only asked for and given in June 1864. But looking to the steps which were taken by the Principal Sudder Ameen from and after January 1862, and to the whole facts of the case, we hold that the sanction of the Judge was a mere form, which, when accorded, legalised the whole proceedings, and rendered all the previous acts of the Principal Sudder Ameen perfectly correct and valid. In this view, execution was revived before the expiry of the three years accorded by Act XIV of 1859, and the representatives of both parties being in the same category, the Principal Sudder Ameen should have allowed both to proceed with execution.

We amend his decision accordingly, and this ruling has the effect of dismissing the appeal in case 435, and of decreeing it in case 498. All costs to the successful appellants, respondents in case 435.

The 9th January 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr,
Puisne Judges.

Sale (in execution of decree)—Fraudulent resistance—Limitation.

Case No. 445 of 1864.

Miscellaneous Appeal from an order passed by the Judge of Rajshahye, dated the 21st June 1864.

Kashee Persad Roy and others, *Petitioners,*

versus

Shib Chunder Deb, *Opposite party.*

Baboos Mohendro Lall Shome and *Romesh Chunder Mitter* for Petitioners.

Baboo Luckhee Churn Bose for Opposite party.

A decree was obtained against property belonging to the debtor but in the possession of another person, under a fraudulent or insufficient title, between whom and the decree-holder litigation ensued. Execution being applied for within three years from the close of such litigation,—HELD that litigation did not apply; also that the re-transfer of the property to the legal representatives of the original debtor did not operate to prevent its sale.

THE decree-holder obtained a decree *ex-parte* on 30th April 1843. The judgment-debtor was dead, and certain property belonging to him was found to be in the possession of Santo Monee, who claimed it as given to her by the judgment-debtor. The decree-holder endeavoured to execute his decree against the property in Santo Monee's hands but was successfully resisted, his case being thrown out in 1856. He then brought a regular suit to set aside that miscellaneous order, and obtained a decree declaring the property belonging to the judgment-debtor in Santo Monee's possession liable to sale in satisfaction of his decree. This litigation went on till 1860, when a special appeal preferred by Santo Monee to the Sudder Court was dismissed on 26th November 1860. The decree-holder then took steps to bring the property to sale, but found it no longer in the possession of Santo Monee, but in that of the legal representatives of the original debtor. How it came into their hands, is not shown us. They, however, resist the decree-holder, alleging, 1*st*, that this application being made in January 1863 is out of time;

2*nd*, that as the original decree was not sought to be executed till 1855, it was barred by limitation, and cannot now be revived; and 3*rd*, that the representatives of the original debtor are not bound by any decree against Santo Monee.

We find that the decree-holder applied in 1854 for the execution of his decree. That case was struck off. He again sued out execution in 1855, and after a contest with Santo Monee, was defeated, and his case rejected in 1856. He then sought to set aside the order passed in execution by regular suit, and was successful, and this litigation went on till November 1860. Now it is evident that Santo Monee, in 1855, or again in the regular suit brought against her, might have pleaded the law of limitation as a bar to the execution. She does not appear to have done so, or if she did, it was without effect. We think, therefore, that this plea of limitation is untenable. We look upon the second suit against Santo Monee as being made in furtherance of the decree obtained against the original debtor and therefore keeping alive the decree which Shib Chunder held. This litigation continued till 26th November 1860; and he applied for execution in January 1863 within three years, and therefore this plea of limitation will not apply; and as regards the third objection, we find the decree is against the property proved to belong to the debtor, but found in the possession of Santo Monee under a fraudulent or insufficient title, and which has been declared liable for the decree held by Shib Chunder, and we do not think the circumstance of its having been shuffled from the hands of Santo Monee into that of the petitioner, should be allowed to prevent its sale. We dismiss the appeal with costs.

The 9th January 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr,
Puisne Judges.

Execution of decree—Hypothecation by Debtor.

Case No. 500 of 1864.

Miscellaneous Appeal from an order passed by the Judge of Moorshedabad, dated the 1st July 1864.

Mr. J. B. Macintosh, Manager on behalf of the Bengal Indigo Company, *Petitioner*,

versus

Syud Nowab Sufder Ali Khan Sufder Jung Bahadoor, *Opposite party.*

Mr. R. T. Allan for Petitioner.

Baboo Sreenauth Banerjee for Opposite party.

A debtor cannot hypothecate the half of a putnee already in the hands of the decree-holders.

WE have heard both parties in this case, and are of opinion that the facts disclosed or admitted scarcely warrant the discretion which the Judge has exercised.

In the first place, if one-half of the putnee is already in the hands of the decree-holder, we do not exactly see how that half can be hypothecated by the debtor. In this view, the assets of the putnee being rupees 17,000 a year, only one-half of the same would be available for the liquidation of the debt. On the other hand, if, as the respondent shows us, the sum of rupees 7,000, representing rents up to Assar last, are already in the Collector's hands, and the rents of the 3 or 4 months' subsequent are expected to be shortly paid, the debtor can have no difficulty in raising the sum of rupees 10,000 yet remaining due by him.

In any view of the case, we hold that the judgment-holders were entitled to press for their money, and that no good reason is shewn for the appointment of a manager, and the postponement of the sale.

The Judge's order is reversed with costs, and the Bengal Indigo Company are hereby declared entitled to take out execution for the remainder of the debt.

The 9th January 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr,
Puisne Judges.

Mesne Profits.

Case No. 420 of 1864.

Miscellaneous Appeal from an order passed by the Officiating Judge of Bhaugulpore, dated the 18th June 1864.

Rajah Tek Narain Singh, *Petitioner*,

versus

Mr. James Furlong and others, *Opposite party.*

Baboo Debendro Narain Bose for Petitioner.

Baboo Unnoda Pershad Banerjee for Opposite party.

A judgment-creditor under a decree awarding a fixed sum for mesne profits "with costs and interest thereon till the date of liquidation," cannot recover mesne profits during the pendency nor subsequent to the decision of the suit.

In this case the plaintiff's claim was decreed. The claim was for possession and for a fixed sum as mesne profits from which a small deduction was made. These with "costs and interest thereon till the date of liquidation" were awarded to the decree-holder. He cannot under this decree recover mesne profits during the pendency nor subsequent to the decision of the suit. If he requires these, he should ask the Court passing the decree to amend its order. We think the decree-holder must be confined to the limits of his decree, and cannot be allowed to import into it anything which is not expressly given him; and, therefore, looking at the terms of this decree, we think any investigation as to the amount of mesne profits quite unnecessary in the present stage of the proceedings. We reverse this part of the order of the lower Court, and decree the appeal with costs.

The 10th January 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr,

Puisne Judges.

Agreements to pay amount due by judgment-debtor.

Case No. 487 of 1864.

Miscellaneous Appeal from an order passed by the Judge of Hooghly, dated the 30th June 1864, reversing an order passed by the Second Principal Sudder Ameen of that District, dated the 30th April 1864.

Musst. Rukeeah Khanum and another, *Petitioners,*

versus

Hazee Mahomed Hashim, *Opposite party.*

Moonshee Ameer Ali for Petitioner,

Mr. R. T. Allan and *Baboo Kishen Kishore Ghose* for Opposite party.

The decree-holder accepted the petitioner's ikrar to pay the amount due by the judgment-debtor from money remitted by a bill to a third person, and on the understanding that the money was in that person's hands. HELD that the petitioner was bound to show that money had been remitted.

We see no grounds for interfering with the order of the Judge. Rukeeah Khanum, widow of Mirza Ali, the judgment-debtor, and her daughter gave an ikrar on 11th December 1859 to the decree-holder, Mahomed Hashim, by which they agreed to pay the money due by Mirza Ali from certain sums remitted by hoondee apparently from London to Mr. Paul, an Attorney of the late Supreme Court in Calcutta. Such debt was to be liable to interest, if not paid within three months; and should they fail to pay the amount, the ikrar gave authority to the decree-holder to realize the amount from the above money so remitted. Mahomed Hashim tried to execute his decree against the money alleged to be in Mr. Paul's hands; but Mr. Paul answered that no funds belonging to the judgment-debtor were in his hands. The decree-holder then attached the property of the appellants, who, to save it from sale, deposited the amount due. The case came before the Judge in appeal on 22nd May 1864, who held that the decree-holder should first go against the money covered by the hoondee as the decree directed, and failing to recover from that source, he might proceed against other assets in the hands of the petitioners. Subsequently the petitioners applied to have the sum deposited by them refunded, but the Judge on 30th June last held that this could not be permitted as it was uncertain whether money sufficient to liquidate the debt could be realized from the said hoondee; and from this order the present appeal is filed. It appears that this hoondee cannot be traced, and it is very certain that there is no money belonging to the judgment-debtor in Mr. Paul's hands. It is for the petitioner to indicate how these hoondees are to be got at, and she cannot be allowed to keep the decree-holder at arm's length by referring him for payment to a party who has no funds, or to bills which may not be in existence or not now in her power. The decree-holder accepted her ikrar on the understanding that the money was in Mr. Paul's hands, which is not the case. We reject the appeal with costs.

The 10th January 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr,

Puisne Judges.

Collection of debts of deceased persons—Tekait.

Case No. 506 of 1864.

Miscellaneous Appeal from an order passed by the Judge of Behar, dated the 30th August 1864.

Baboo Purladh Singh and another, *Petitioners,*

versus

Het Narain Singh, *Opposite party.*

Messrs. C. Gregory and *R. E. Twidale* for Petitioners.

Baboos Romesh Chunder Mitter and *Kishen Succa Mookerjee* for Opposite party.

The assertion of an exclusive right as tekait to a certain talook by a person representing himself as cousin of the deceased, cannot prejudice the right of brothers, as next heirs to the deceased, to collect his debts and to give quittance to his debtors.

WE have heard both parties and have fully considered the Judge's order, which, however, is not just to the appellants, and does not meet the requirements, of the case. The appellants, one of whom is the whole and the other is the step-brother of the deceased, are opposed in their claim for a certificate by a person representing himself to be the first cousin of the deceased, and to have, as tekait, an exclusive right to a certain talook. But the assertion of this right has no connection with, and cannot be allowed to prejudice the right of the appellants, as next heirs to the deceased to collect his debts, and to give quittance to his debtors. The case cited by the Judge of the 5th of February 1863, is scarcely analogous, not to say that the very next case reported in the same number of Hay's Reports is against the Judge, and that a necessity for the grant of a certificate does exist in the case before us, for the debts ought to be collected, and the debtors be released.

The Judge's order is set aside, and he is hereby directed to grant a certificate of administration to the appellants, as requested by them. Costs to the appellants.

The 10th January 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Puisne Judges.*

Guardians of Minors (Interference with).

Case No. 517 of 1864.

Miscellaneous Appeal from an order passed by the Officiating Judge of Cuttack, dated the 24th June 1864.

Maharajah Luckee Narain Aung Bheem, *Petitioner,*

versus

Sooruj Monee Pat Mohadaye, *Opposite party.*

Mr. R. V. Doyne and *Baboo Unoocool Chunder Mookerjee* for Petitioner.

Mr. R. T. Allan and *Baboos Kishen Kishore Ghose, Obhoy Churn Bose,* and *Nil Madhub Sein* for Opposite party.

A person, apprehending danger to the health or life of a minor, should ask the Court's interference under section 21 Act XL of 1858.

WE have heard Mr. Doyne for the appellant, but we can find no reason for interfering with the order of the Judge as passed in the case, and under the practical shape which it assumed before him. The Judge correctly observes that, to admit strange servants into the family and household of the lawful custodian of the minor, would be to introduce therein certain elements of strife and confusion. The appellant, if he really apprehended danger to the health, wants, or life of the minor, should have presented himself in Court and have directly requested the Court's interference under Section 21 Act XL of 1858. This he may still do, if he be so advised, and if he can make out a strong case. But, for the present, we confine ourselves to upholding the Judge's order, and to dismissing the appeal with costs.

The 10th January 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Puisne Judges.*

Order passed in execution of decree—Appeal (by objectors).

Case No. 522 of 1864.

Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of Bhaugulpore, dated the 16th July 1864.

Motee Singh and others, *Petitioners,*

versus

Rajah Neelanund Singh, *Opposite party.*

Baboo Luckhee Churn Bose for Petitioner.

Moonshee Ameer Ali for Opposite party.

Objectors (whose claim to a moiety of the property sought to be taken in execution has been admitted by an order of Court) are in a like position to decree-holders against the original decree-holder, and may therefore appeal from an order passed in execution of decree.

In this case Rajah Neelanund Sing obtained a decree against Trilochun, Punnoo, and Runjeet, sons of Toofany Ghatwal, for possession of the ghatwalee tenure. In attempting to execute his decree, he was opposed by three other sons of Toofany (Motee, Khagut, and Rashdharee) who pleaded that as they were not parties to the suit, the decree was inoperative against them. Their plea was admitted in appeal to this Court, and the Rajah was directed to execute his decree only against the parties whom he had made defendants. Before, however, the order of this Court was passed, the decree-holder had obtained possession. The petitioners then applied to be put into possession of a moiety of the ghatwalee, *viz.*, of 10 asuly and 16 dakhely villages, according to the order of the High Court. An Ameen was deputed to give possession, which was completed on 21st March 1864. On the 18th idem, while possession was being given, the decree-holder objected to the Ameen's proceedings, stating that the petitioners in collusion with a peadah were taking possession of dakhely villages not within the ghatwalee, and that there were no dakhely villages within the tenure. The Principal Sudder Ameen, on 16th July 1864, on reference to the decree, found that no dakhely villages were mentioned therein, and ordered that the petitioner's claim to dakhely villages should be thrown out. An appeal is preferred against this order; and an objection to hearing the appeal was taken on the part of the original decree-holder that, as petitioners were not parties to the suit, they had no right of appeal to this Court from the order passed in execution of a decree. But we think that the order of the High Court admitting their claim on a previous occasion, put them in a different position from that of third parties. They were, in fact, decree-holders against Rajah Neelanund Singh, and in that capacity enforced their decree for possession of a moiety of the property. The proper course on the petition of the Rajah claiming the dakhely villages as not included in the property decreed, was to bring the case under the provisions of Section 230 Act VIII of 1859, and to have decided it after hearing evidence; and we should be disposed to remand the case that this course might be pursued, were we not shewn by Moonshee Ameer Ali, for Rajah Neelanund Singh, a subsequent decree obtained by the Rajah against these petitioners for the moiety of which they have now been put in possession. That decree is now in appeal before this Court; and as all questions between the parties will be determined at the hearing of that case, we think it unnecessary to go on further with the present appeal, which we dismiss. The parties will pay their own costs.

The 10th January 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr,
Puisne Judges.

Insane persons—Enquiries under Act XXXV of 1858.

Case No. 539 of 1864.

Miscellaneous Appeal from an order passed by the Judge of Tirhoot, dated the 27th June 1864.

Musst. Moofut Koonwur, *Petitioner,*

versus

Baboo Dhurm Narain Singh (Isane),
Opposite party.

Baboo Kishen Succa Mookerjee for Petitioner.

Moonshee Ameer Ali for Opposite party.

A Judge, instead of striking off a case because an alleged insane person does not appear after service of notice, ought, in such event, to prosecute the enquiry contemplated by Act XXXV of 1858.

The Judge was wrong in striking off this case, because the alleged insane person did not appear after notice was served. It was his duty, in such event, to prosecute the enquiry contemplated by the Act, because it is obvious that the petitioner could not compel the attendance of the insane person, and so the said insane might baffle enquiry by simply keeping at a distance from the Court.

We are shown, moreover, that the alleged insane has appeared in another case, and has signed a vakalutnamah.

Under these circumstances, the order of the lower Court is annulled, and the case is returned to the Judge, who will make the enquiry contemplated by Act XXXV of 1858, in the presence of the isane person, if possible, and if not, in his absence, by such evidence as may be presented to him.

Each party may bear his own costs in this appeal.

The 16th January 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Sale in execution of Decree—Limitation—Appeal.

Case No. 477 of 1864.

Miscellaneous Appeal from an order passed by the Judge of Hooghly, dated the 7th June 1864, *affirming an order passed by the Principal Sudder Ameen of that District, dated the 29th March* 1864.

Gopal Chunder Ghose, *Petitioner,*

versus

Raj Chunder Dutt, *Opposite party.*

Baboo Bama Churn Banerjee for Petitioner.

Baboo Banee Madhub Banerjee for Opposite party.

In a suit for possession of moveable property by a purchaser at a sale in execution of a decree, limitation will not reckon during the timet hat the judgment-debtor's case to set aside the sale was pending in the Civil Court.

No appeal lies from an order refusing to grant possession under Section 259 and 263 Act VIII of 1859.

THE petitioner purchased some property belonging to a judgment-debtor, Tripoora Dossee, so far back as 1846. He applied for certificate and possession; but the Civil Court in 1847 held that, till the suit brought by Tripoora to set aside that sale was disposed of, no order for possession could be given. Tripoora's case was not finally disposed of till 1856, and in 1861 the petitioner applied for possession under the provisions of Sections 259 and 263 of Act VIII of 1859. This application was struck off in 1862. The petitioner applied again for possession in 1863, and the first Court held that the application was barred by limitation. On appeal to the Judge, he rejected the petition, on the ground that the law did not provide for an appeal in such cases. We think the view of the law taken by the Judge is correct; but looking at the decision of the first Court, we do not see very clearly how the Principal Sudder Ameen has been able to apply the law of limitation, for it is clear that the petitioner is entitled to all the time during which Tripoora's case was pending in the Civil Court. As, however, there is no appeal to this Court, we think the proper course for the petitioner to follow, is to ask for a review of the judgment of the first Court if so advised. This appeal is rejected with costs.

The 16th January 1865.

Present:

The Hon'ble G. Loch W. S. Seton-Karr, *Judges.*

Execution of Decrees—Cross-decrees.

Case No. 560 of 1864.

Miscellaneous Appeal from an order passed by the Judge of Rajshahye, dated the 14th September 1864.

Ram Coomar Ghose, *Petitioner,*

versus

Huro Soondaree Debia and others, *Opposite party.*

Mr. Paul and *Baboo Lulleet Chunder Sein* for Petitioner.

None for Opposite party.

The High Court having ruled that, notwithstanding the existence of cross-decrees between A. B. and C. D, the present decree-holder E. F, in taking out execution against A. B was entitled to attach the decree held by A. B against C. D, the Judge below should not again have entertained the same objection, but confined himself to carrying out the former orders.

ANUND Mohun Ghose held a decree against Huro Soondaree. Gobind Nauth Sandyal and Huro Soonduree have cross-decrees. Anund Mohun took out execution and attached the property of the judgment-debtor, Huro Soonduree, and among it the decree which she held against the Sandyal. The Sandyal objected, claiming a right to settle by a set-off, and his objection was admitted by the lower Court. Anund Mohun appealed to the High Court making the Sandyal a party the appeal; and on 5th January 1863 it was held that, notwithstanding the existence of cross-decrees between the Sandyal and Hurro Soonduree, the decree-holder Anund Mohun had the right to attach the decree held by Huro Soonduree against the Sandyal, and reversed the order of the lower Court. The question, therefore, which is now before the Court in appeal, has been already settled by the decision of 5th January 1863, and the Judge should not

again have entertained the objection raised either by the Sandyal or by parties representing Hurro Soondurree, but confined himself to carrying out the orders of this Court. We reverse the order of the Judge, and decree this appeal with costs.

The 17th January 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Decree (keeping alive of).

Case No. 531 of 1864.

Miscellaneous Appeal from an order passed by the Judge of Midnapore, dated the 30th June 1864, reversing an order passed by the Principal Sudder Ameen of that District, dated the 9th May 1864.

Sheikh Idoo, *Petitioner,*

versus

Sheikh Besharoolla and others, *Opposite party.*

Baboo Nursingh Chunder Mitter for Petitioner.

Baboo Opendur Chunder Bose for Opposite party.

The presentation of a petition, without any further active steps on the part of a decree-holder, is insufficient to keep alive his right to execute a decree.

We think the Judge was right in considering that the petitioner failed to keep alive his case. He filed a petition in January 1861 with a list of property, praying for the execution of his decree against that property, and there his exertions ended. An intervenor claimed the property. The petitioner was summoned by the Court to give evidence, failed to attend, and the case was struck off. It is clear, therefore, that, beyond filing a petition, the petitioner did nothing. We think the presentation of a petition without any further active steps on the part of a decree-holder is insufficient to keep alive his right to execute a decree, and we reject the appeal with costs.

The 20th January 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Decree for Mesne profits—Mode of calculation.

Case No. 545 of 1864.

Miscellaneous Appeal from an order passed by the Judge of Rajshahye, dated the 29th June 1864, affirming an order passed by the Principal Sudder Ameen of that District, dated the 25th April 1864.

Mary Smith, *Petitioner,*

versus

Sona Bibee, *Opposite party.*

Baboo Mohinee Mohun Roy for Petitioner.

Baboo Mohendro Loll Shome for Opposite party.

The amount of mesne profits should not be limited to the amount actually collected from an estate by the judgment-debtor, but should not be calculated according to the assets which might have been realized with due diligence.

In a case of execution to recover mesne profits, an Ameen was deputed to ascertain what the party in possession had recovered from the estate. From the evidence of the ryots, he found that the judgment-debtor had recovered about rupees 237-12 in 16 years. But from measurement and investigation he found that the area was 100 beegahs, of which half had been cultivated for 7 years, and the remainder for 9 years; that the average assessment was 13 annas a beegah, and at that rate the sum due to the decree-holder for the 16 years was rupees 1,034-12-7, which amount was awarded to the decree-holder by both the lower Courts.

An appeal has been preferred by the judgment-debtor, on the ground that the Ameen exceeded his instruction in measuring and assessing the lands which he was not required to do; that he was required to ascertain merely what the judgment-debtor had realized during his incumbency, and having done this, that his functions were at an end; that even if his assessment be correct it is not according to the assessment, but to the actual collections, that mesne profits are to be awarded, and that the decree-holder's own jumma wassil bakees for 1269, which he put in after having obtained possession, show that the collections were only rupees 57-5, and assuming that sum to be correct, the decree-holder would receive only half that sum for the first 7 years, while half of the area in dispute was under cultivation, and the whole for the remaining 9 years, making a total of about rupees 670.

We think, in conformity with previous decisions of this Court, that mesne profits are not limited to the amount actually collected from an estate by the judgment-debtor, but must be calculated according to the assets which might have been realized with due diligence. We, therefore, reject the first plea taken by the appellant; and had the decree-holder, respondent, not shewn as a different state of things, we should have confirmed the order of the Courts below. But we find, from the decree-holder's own papers of collection made when the estate was in the highest state of cultivation, that the jumma of the estate was in 1269 rupees 57 some annas; and for 1270, rupees 69-10-6. We think, therefore, that, if we give a decree for mesne profits at the rate of the last mentioned sum, the decree-holder will get all that he is fairly entitled to. We, therefore, direct that, for the 7 years during which only half of the land was cultivated, he receive at the rate of the half of the last mentioned sum, and for the remaining nine years at the full rate of rupees 69-10-6.

The appellant will get his costs.

The 20th January 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Family Jewels (Transfer of—by widow)—Certificate (Revocation of).

Case No. 581 of 1864.

Miscellaneous Appeal from an order passed by the Judge of Sarun, dated the 30th August 1864.

Bhagwanee Koonwur, *Petitioner,*

versus

Parbutty Koonwur, *Opposite party.*

Messrs. R. T. Allan and *C. Gregory* and *Baboo Tarucknath Sein* for Petitioner.

Baboo Kalee Kishen Sein for Opposite party.

Family jewels, if part of the ancestral property, are not transferable by a widow except for special purposes; and acts of waste on the part of the widow in regard to her husband's property, if proved, would be a ground for withdrawing a certificate granted to her under Act XL of 1858.

We think the enquiry held by the Judge is insufficient. It is evident that the step-mother of the minors sold or parted with some of the family jewels to one Nundo Lall Bhugut, for what purpose, or under what circumstances, does not appear; and the Judge instead of coming to some decision upon this point as to whether the act amounts to waste injurious to the infants under their step-mother's care, says—"Even, if true, the "jewels were given to Nundo Lall Bhugut "who is allowed to be a friend of the family, "and to have taken an interest in the minors, "and the property would hardly have been "transferred to such party if the intention "of the guardian had been adverse to the in-"terest of the minors;" and then—"Besides "the witnesses do not say for what purpose "the jewels, &c., had been made over." It is clear to the Court that it was the Judge's duty to ascertain from the witnesses, or the party alleging the transfer of the jewels, or even from the step-mother herself, or from the party receiving them, the cause for which they had been transferred. These jewels appear to have been part of the ancestral property, and, as such, were not transferable by the widow except for special purposes; and if they are of considerable value, such conduct may render her unfit to continue as guardian of the minors. We remand the case to the Judge with instructions to allow both parties to file any further evidence, oral or documentary, they think fit, and, after thoroughly cross-examining the witnesses and sifting the case, to pronounce distinctly whether the widow has committed such acts of waste as render it necessary to withdraw the certificate granted to her under Act XL of 1858.

The 20th January 1865.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice,* and G. Loch and W. S. Seton-Karr, *Judges.*

Application to set aside sale under Section 256 Act VIII of 1859.

Case No. 197 of 1864.

Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of Bhaugulpore, dated the 27th February 1864.

Joge Narain Singh (Intervenor), *Appellant,*

versus

Bhugbano (Decree-holder) and others, *Respondents.*

Baboos Dwarkanath Mitter and *Chunder Madhub Ghose* for Appellant.

Mr. John Baptist for Respondents.

A, being mortgagee of two properties M and P, obtained a decree under which both were attached and lotted for sale, P to be sold first and M afterwards. On the application of the judgment-debtor, the Principal Sudder Ameen sold M first and P secondly. After the sale, J, claiming as purchaser of M under a conveyance dated subsequently to the mortgage, applied to the Court to set aside the sale as irregular. HELD that he could not come in under Section 256 Act VIII of 1859 (*dissentiente* Seton-Karr, J.).

Mr. Justice Seton-Karr.—It is quite clear that the alteration in the sale at the instance of the judgment-debtor, on the part of the Court, was a most unnecessary and irregular act. The creditor had requested the mouzahs to be sold in the following order—Poorunwar first, and Mohwa afterwards. The sale notice had been issued accordingly; and yet, on the request of the

debtor, this order of things was reversed. There can be no doubt that the appellant, who had purchased a portion of Mohwa mouzah, was injured by a sale which need never had taken place at all, because Poorunwar, if put up first to sale, as originally ordered, would have liquidated the whole decree.

It is argued, however, against the appeal, that the only remedy left is a Civil suit; and that the appellant cannot be heard, as Section 11 of Act XXIII of 1861 does not permit of an appeal on his part, he not being one of the parties to the suit. But this Section, it is said, does not apply. It is also replied to the above argument, that he, appellant, comes in under Section 256 and 257 of Act VIII of 1859, the words of which are very general—"application may be made to the Court." There are no words here restricting the application to "parties to the suit;" and the said Sections are certainly not repealed by any thing in Act XXIII of 1861.

On the whole, looking to the provisions of Section 256 only, it seems that the words are so wide and comprehensive as to embrace every one affected by a sale of immoveable property; and this being so, and the appellant having clearly sustained injury by an unnecessary deviation from the proper and prescribed order of things, he is entitled to relief.

That relief I would give him, and decree the appeal with costs, setting aside the sale, and reversing the decision of the Principal Sudder Ameen.

Mr. Justice Loch.—After much consideration of the two Sections, 256 and 257, it appears to me that they apply not to a third party, but to the judgment-debtor, who alone is affected by any irregularity in *publishing* or *conducting* the sale. On his application pointing out the material injury he has suffered from any irregularity, the Court will enquire; and if it reject the application, an appeal lies to the higher Court; and the order passed in appeal is final, and the party against whom the same has been given shall be precluded from bringing a suit for establishing his claim. If the word 'application in the above two Sections be limited to the application of the judgment-debtor, then they and Section 11 Act XXIII 1861 may be read together, which latter law provides that "any other "questions arising between the parties to "the suit in which the decree was passed, "and relating to the execution of the decree, "shall be determined by order of the Court "executing the decree, and not by separate "suit; and the order passed by the Court "shall be open to appeal." It appears to me that two courses were open to the petitioner—the one when attachment was made under Section 246, which remedy he has lost; the other under Section 269, which still remains open to him. The sale of the right and interest of the judgment-debtor, if he have already disposed of them, for consideration in good faith to the petitioner, can do the latter no injury, for nothing is really sold; and if the auction-purchaser do dispossess him, he can at once apply to the Court executing decree for redress under Section 269, or he can, without waiting to be dispossessed, bring a suit to set aside the sale, as likely to do him injury. His present application in the shape he has brought it, appears to be premature; and I would, therefore, not interfere with the order.

The Chief Justice.—Mussamut Bhugbano was the mortgagee of two properties, Mohwa and Poorunwar. She obtained a decree for the sum of rupees 8,886 as due under the mortgage on the 24th of January 1861. Under that decree, both estates were put up for sale. The judgment-creditor applied for an order for the sale of the two properties in the following order, *viz.*, Poorunwar first, and Mohwa subsequently. Proclamations were issued, and the two properties were lotted for sale in that order. Subsequently the judgment-debtor filed his petition and asked that the order of sale might be reversed. The judgment-creditor opposed it, but the Principal Sudder Ameen acceded to the judgment-debtor's petition, and accordingly Mohwa was first sold.

The present applicant, who was a purchaser of 8 annas of Mohwa under a deed of sale dated the 11th of January 1850 (subsequent to the plaintiff's mortgage), came to the Court, claiming under Section 256 to set aside the sale on the ground of irregularity. And the question for my opinion is, whether the applicant could come in under that Section.

I have no doubt but that the applicant, who held under a title subsequent to the mortgage, has a right in equity to compel the mortgagee to resort in the first instance for satisfaction to the estate of Poorunwar (*See* Story's Equity Jurisprudence, Section 633). But he did not appear before the Court. And it seems to me that between the judgment-creditor and the judgment-debtor, as a

general rule, the Judge should resort to that fund or estate the sale of which is likely to be least burdensome or distressing to the judgment-creditor, unless it appears that the judgment-creditor, whose only interest in the matter is to get his money, or any other person, is likely to be prejudiced; and consequently that, on the facts before him, the Principal Sudder Ameen was right in selling the estate of Mohwa. I concur with Mr. Justice Loch in thinking that the applicant could not come in under Section 256; and on that ground, as well as on the ground that in fact there was no irregularity in the sale, I would not interfere with the order of the Court below.

The 23rd January 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Satisfaction of decree as to shares settled with or released by decree-holder.

Case No. 530 of 1864.

Miscellaneous Appeal from an order passed by the Judge of Backergunge, dated the 24th June 1864.

Mr. William Foley, *Petitioner,*

versus

Mrs. Annie Kolonas and others, *Opposite party.*

Baboos Romesh Chunder Mitter and *Kalee Mohun Doss* for Petitioner.

Baboo Onoocool Chunder Mookerjee for Opposite party.

A private settlement with or release given to any of several debtors will not justify a decree-holder in requiring from the remaining debtors on account of the share or shares so exempted or settled.

We have heard both parties on the facts of this case, which, up to a certain point, are freely admitted by both pleaders. A certain Greek gentleman had five heirs—a widow, two sons, and two daughters—each of whom took one fifth of his property.

One son, Demitri, died, and the other Midas avowedly succeeded to his brother's share, and is thus in clear possession of two-fifths of the estate. His one daughter, Margaret, also died; and the contention in the present summary case is, whether the husband of the surviving daughter, Sophia, is justified in coming down on the surviving son for three fifths and not merely for two-fifths of the property, and in exempting his own wife and his mother-in-law, the widow of the original proprietor, from any further claim.

We think the Judge was right in ruling that any private settlement with or release given to, any of the debtors, would not justify a decree-holder in requiring payment on account of the share or shares so exempted or settled, from the remaining debtors.

But the point really is in this case, what has become of the deceased Margaret's share, and from whom may the decree-holder lawfully require it? Now, this point has not been enquired into, and yet there is no reason whatever why it should not be enquired into and settled, so as, if possible, to prevent further litigation.

The decree-holder, husband of the surviving sister, professes himself ready to prove that the surviving son or his heirs are in possession, not of two-fifths as they allege, but of three-fifths, thus including the share of Margaret; and the respondents equally profess themselves able to disprove or rebut this allegation. The Judge should take evidence on these points as offered by both parties, and decide the case accordingly. It is quite obvious that if the decree-holder fail in giving evidence, or if his evidence is discredited and rebutted, he will only be entitled to two-fifths, while, if he succeed against his opponents, he may take out execution now for three-fifths; and, in any case, the unsuccessful and discontented party may, if he think fit, pursue his claim in a regular suit.

Case remanded to the Judge, who also will take up the case promptly, and decide it with reference to the above remarks.

The 23rd January 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Decree (Amendment of).

Case No. 529 of 1864.

Miscellaneous Appeal from an order passed by the Judge of Tirhoot, dated the 25th June 1864, *amending an order passed by the Principal Sudder Ameen of that District, dated the 27th April* 1863.

Kishen Dyal Singh, *Petitioner,*

versus

Sunkur Dutt, *Opposite party.*

Baboo Mohesh Chunder Chowdhry for Petitioner.

Babooe Unnoda Pershad Banerjee and *Banee Madhub Banerjee* for Opposite party.

A decree should not be amended except in the presence of the parties affected, or after service of notice on them to attend.

It is evident from the finding of the Judge that the respondent in this case was not present when the decree under which the petitioner claims was amended. The decree, as it originally stood, was for possession without mesne profits. By subsequent petition, the decree-holder applied for mesne profits, which were allowed under Circular Order of 11th September 1829; but at this proceeding the respondent was not present or represented. Now, it cannot be said that an order for mesne profits is of such little moment that it is a matter of little consequence whether the party against whom mesne profits be decreed be present or not, or be allowed to object to the payment or not. We think it very necessary that when a decree has to be amended, it should be done in the presence of the parties or after notice to attend has been served. As no notice was served in the case, and the respondent was not present when the mesne profits were awarded, we affirm the decision passed by the Judge, and reject the appeal with costs.

The 24th January 1865,

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Limitation under Section 21 Act XIV of 1859 (Commencement of).

Case No. 616 of 1864.

Miscellaneous Appeal from an order passed by the Judge of Beerbhoom, dated the 4th August 1864, *reversing an order passed by the Principal Sudder Ameen of that District, dated the 5th December* 1863.

The Collector of Beerbhoom, on behalf of Rambunjun Chuckerbutty (minor), *Appellant,*

versus

Raj Coomaree Dassia and others, *Respondents.*

Baboo Kishen Kishore Ghose for Appellant.

None for Respondents.

Limitation under Section 21 Act XIV of 1859 counts from the 5th May 1859 (the date of the passing of the Act), and not from the date of its coming into operation.

THE Judge's order is opposed to a variety of decisions on the point of limitation passed by the High Court, by which it has been held that limitation under Section 21 Act XIV of 1859, will run, in the words of the law, from the time when the Act was passed, *viz.*, 5th May 1859, and not from the date of its coming into operation. We, therefore, reverse the order of the Judge.

The 24th January 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Court passing decree cannot interfere with order of Court executing it.—Appeal.

Case No. 564 of 1864.

Miscellaneous Appeal from an order passed by the Judge of Behar, dated the 13th August 1864, *reversing an order passed by the Principal Sudder Ameen of that District, dated the 19th February* 1864.

Mungle Pershad and others, *Appellants,*

versus

Gudooree Singh, *Respondent.*

Baboo Mohendronath Seal for Appellants.

Mr. A. F. Lingham for Respondent.

The decree was passed by the Moonsiff of Gya. Execution was sought from the Moonsiff of Aurungabad who ruled that execution was barred by limitation. HELD that the Moonsiff of Gya had no authority to set aside the decision of the Moonsiff of Aurungabad; and that the appeal from that order lay to the Judge.

THE Judge's order is quite correct. Where the execution of a decree is made over to a Court other than that which passed the decree, the Court executing the decree has authority to hear all objections and pass such orders as if it were executing its own decree; and an appeal will lie from any order so passed in the usual course to the Judge; and the Court, which passed the decree, has no jurisdiction to interfere with or set aside any order passed by another Court executing that decree. In this case the decree was passed by the Moonsiff of Gya. Execution was sought from the Moonsiff of Aurungabad. The latter officer held that execution was barred by limitation. The appeal from that order lay to the Judge. The Sudder Ameen, as Moonsiff of Gya, had no authority to set aside the decision passed by the Moonsiff of Aurungabad.

This appeal is dismissed with costs.

The 25th January 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Decree-holders (Right of priority of execution)—Estoppel.

Case No. 541 of 1864.

Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of Bhaugulpore, dated the 5th September 1864.

Raj Coomar Sing and others (Judgment-debtors), *Appellants,*

versus

Birj Mohun Thakoor and others (Decree-holders), *Respondents.*

Mr. R. T. Allan and *Baboos Dwarkanath Mitter* and *Kalee Mohun Doss* for Appellant.

Messrs R. V. Doyne and *John Baptist*, and *Baboos Unnoda Pershad Banerjee* and *Khettur Nauth Bose* for Respondents.

A decree-holder who, under the terms of his bond, is entitled to proceed against any property of the judgment-debtors, is not estoppel (by a petition filed by him upon the attachment of certain property belonging to the judgment-debtors, praying that the said property, if sold, my be sold with notice of his lien upon it) from proceeding against other property of the judgment-debtors.

THE appellants are the judgment-debtors. The decree-holders are Birj Mohun Thakoor and others. They advanced the sum of Rupees 60,000 to the appellants, taking their bond by which talooks Kapportee Sencoora and Russook Modah were pledged as security for the debt. The sum was to be repaid in five years, but the bond contained a condition that, if within the time specified any part of the above property was attached or otherwise interfered with by a third party, such attachment or interference should be considered a cause of action, and enable the lenders to bring a suit for the principal and interest, though the period of five years had not expired.

Gunga Pershad, another decree-holder, in the month of March 1864, attached talook Russook Modah; and plaintiff then filed a petition, praying that, if the property were sold, it might be sold with notice of his lien upon it. It was sold for rupees 82,000 to Goudun Mul on 27th June 1864, notice, as requested by the lenders, having been given.

On 8th March 1864, the lenders brought their suit for rupees 63,000, principal and interest, and, on 5th April following, obtained a decree, and in execution, instead of going against the property which had been mortgaged to them, and exercising their right as mortgagees by demanding the money due to them from the auction-purchaser who had purchased with knowledge of the lien, they turned to other property, and on 22nd May attached the talooks Kujra Ghosal and Kujra Down. The judgment-debtors remonstrated, alleging that the conduct of the decree-holders was inequitable, for, by giving notice of their lien, property worth three lacs of rupees had been sold for rupees 82,000; and as the decree-holders, by giving this notice, had indicated their intention of going against this property, it was manifestly unjust for them now to take another course and proceed against other property. The first petition of objection was filed on 22nd July 1864, on which a report was called from the Office. A second petition was put in on 28th idem, praying that the sale fixed for 1st August might be deferred till the objection taken by the debtors had been gone into. The sale was accordingly deferred till the 5th September 1864, when the petition of the debtors was rejected, and the property was sold on the same day for Rupees 66,000; the Principal Sudder Ameen holding that a decree-holder might proceed against any property he pleased.

It is contended that the bond gave the decree-holder a choice either to go against the property pledged or against other property, but not against either indiscriminately; that, by his petition to the Court in March 1846, he had clearly indicated his intention of going against the mortgaged property, and till that were sold and found insufficient to liquidate the debt, he could not proceed against other property; and that the petition of March 1864 is an estoppel. It is also said that the words used in the bond mean (what they do not) that, if the pledged property be sold, then the decree-holders may go against other property.

We cannot concur in this view of the case. The decree-holder, by his petition of March 1864, neither deceived the judgment-debtors nor put them in a position worse than they were before. He merely warned purchasers that he had a lien on the property Russook Modah about to be sold. But such a public intimation, though it clearly preserved his right to go against this property, and prevented any purchaser from saying that he knew nothing of the mortgage, cannot be considered an election on his part to go against the mortgaged property only, or to debar him of the right which is clearly assigned to him by the terms of the bond, that if the property in question be attached and be in danger of sale for arrears of Government revenue, or decrees of Court, the mortgagees may proceed against the said property or any other property belonging to his debtor, whichever he pleases, and realise the amount of his claim. There can be no doubt that the decree-holders were, under the terms of the bond, entitled to go against any property belonging to their judgment-debtors; and the latter have no one to blame but themselves for giving such large terms, which could be made use of with

such advantage by the creditor. We cannot look upon the step taken by the creditor to preserve his right in the mortgaged property; by filing his petition of March as an estoppel to his proceeding against other property; nor do we perceive upon what grounds we can give relief to the debtors, who, from the other cases which have come up with this, appear to be in a state of hopeless embarrassment, and surrounded with creditors holding decrees which they are seeking to execute. If the petitioners consider that they have been endamaged by the decree-holder's acts, they can, if so advised, seek a remedy in the shape of a suit for damages, but we pronounce no opinion on the point.

The appeal is dismissed with costs.

The 30th January 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Reversal of sale of immoveable property under Section 257 Act VIII of 1859—Order of Judge when final.

Case No. 409 of 1864.

Miscellaneous Appeal from an order passed by the Judge of Bhaugulpore, dated the 31st May 1864, affirming an order passed by the Principal Sudder Ameen of that District, deted the 1st March 1864.

Kooldeb Singh and others, *Appellants,*

versus

Juggurnath Singh *alias* Looloo Singh and others, *Respondents.*

Baboo Roopnath Banerjee for Appellants

Baboo Opendur Chunder Bose for Respondents.

Under Section 257 Act VIII of 1859, the order of a Judge on appeal, setting aside a sale of immoveable property on the ground of irregularity, is final, unless, under Section 35 Act XXIII of 1861, the Judge is shewn to have acted without jurisdiction.

We think that the petitioner has no right of appeal. The Judge, on appeal, found that there had been a material irregularity in issuing the proclamation of sale, which, in his opinion, caused a material injury to the judgment-debtor, and under these circumstances he set the sale aside. His order in appeal under Section 257 is final, unless, under the provisions of Section 35 Act XXIII of 1861, the petitioner can show us that the Judge has acted without jurisdiction. He cannot do this, and we, therefore, reject the appeal with costs.

The 2nd February 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Widow to whom certificate to collect her husband's debts has been granted—Power of, to sell money decrees.

Case No. 494 of 1864.

Miscellaneous Appeal from an order passed by the Judge of Shahabad, dated the 11th June 1864, affirming an order passed by the Principal Sudder Ameen of that District, dated the 12th March 1864.

Bhugwan Dass, *Appellant,*

versus

Luchmee Narain and others, *Respondents.*

Baboo Mohinee Mohun Roy for Appellant.

Baboo Kishen Succa Mookerjee for Respondents.

The sale by a widow (who has obtained a certificate under Act XXVII of 1860 to collect the debts due to her husband's estate) of a money decree belonging to her husband's estate, cannot be set aside, except on the ground of fraud, either as not being the heir and selling what she had no power to transfer, or as making a paper transfer to avoid the effect of execution.

The petitioner is the purchaser of a money decree from the widow of Jowahir Loll. He sought to execute this decree against the debtor, but was met by certain parties holding decrees against Jowahir Loll, who pleaded that the sale was collusive. In appeal, the Judge found that, though the widow had obtained a certificate under Act XXVII of 1860 to recover debts due to her husband's estate, that certificate gave her no power to dispose of his property; and he, therefore, confirmed the order of the first Court.

An appeal is preferred by the vendee to this Court. It is admitted that, as a Hindoo widow, plaintiff had no right to part with her husband's property. But it is urged that the transfer by her of a money decree to a third party for full consideration, the purchaser acting in good faith, was in fact a realization of the debt, for she thereby realized the amount due to her husband without trouble or cost, and merely transferred her right to recover from the judgment-debtor; and, therefore, the lower Court should have allowed the purchaser an opportunity of proving the *bonâ fides* of his purchase.

In reply, it is urged by the intervenor that, so long as the decree remained in the hands of the widow, it was liable to attachment for the debt of her husband; but if she were once allowed to part with it privately for a consideration adequate or otherwise, her husband's creditors could no longer exercise any power of attachment over it, the decree being no longer the property of her husband but of a third party against whom they held no decree, and she might, in the mean time, spend the money as she pleased.

It is not stated that the sale of this decree was made in order that the widow might pay off her husband's debts. It appears to have been made for her own convenience. Now, suppose the deceased's property to consist mainly of decrees and debts, a widow, by parting with those for a consideration, could, without difficulty, defeat her husband's creditors, and spend the money for her own purposes. This is true; but what is there to prevent a widow from settling with the judgment-debtor? She is not obliged to come into Court to execute her decree; and if she choose to make a settlement and receive the amount or part of it, who can prevent her so doing? Unless it be shewn, that this was a fraudulent sale, it must stand good. The decree is only money in another shape. If the widow received a money-income from property either landed or founded, she might spend it for her own support; or if her husband had left a lump of money, she might have done the same with it, and no one could have objected to her making this use of it. If she is not the heir, of course she has no right to sell the property. Mention is made of sons who are said to have given up all claims to their father's property. When was this? and by what act have they shewn that they have done so? It appears to us that the only ground on which the sale by the widow can be set aside, is that of fraud, either as not being the heir, and selling what she had no power to transfer, or as making a paper transfer to avoid the effect of execution. The Judge has not come to a finding on this point, and we remand the case to him for the disposal of it with reference to these remarks.

The 6th February 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Interest (on Costs).

Case No. 625 of 1864.

Miscellaneous Appeal from an order passed by the Judge of Moorshedabad, dated the 18th August 1864.

Haradhun Sandyal, *Appellant,*

versus

Rash Monee Dassia and others, *Respondents.*

Baboo Tarucknath Sein for Appellant.

Baboos Romesh Chunder Mitter and *Luckee Churn Bose* for Respondents.

Costs carry interest, whether so expressed in the decree or not.

THE objection taken is that, though costs have been awarded to the opposite party, interest on those costs has not been allowed, and yet the Judge has now held the petitioner liable to interest on costs.

In this Court, the practice is that costs carry interest with them, and such was the opinion of the late Sudder Court as shewn by their decisions. We see no ground for interfering with this order, and reject this appeal and No. 661 with costs.

The 6th February 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

No Appeal to High Court from order of distribution among several decree-holders —Sale of one's mortgaged property in execution of decree against another (Effect of).

Case No. 579 of 1864.

Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of Tirhoot, dated the 7th September 1864.

Jungee Loll Mahajun, *Appellant,*

versus

Brijo Beharee Singh and others, *Respondents.*

Mr. R. E. Twidale for Appellant.

Baboo Mohesh Chunder Chowdhry for Respondent.

No appeal lies to the High Court from an order distributing sums realized in execution among various decree-holders.

The sale of property mortgaged to A, in execution of a decree against B, will not extinguish A's lien, whether notification of the mortgage were or were not given at the time of sale.

WE think, as objected by the other side, that there is no appeal to this Court from an order distributing sums realized in execution among various decree-holders; nor do we see how in this case the petitioner has sustained, or is likely to sustain any injury. If, as he asserts, he has a mortgage on the property, the sale of it in execution of the decree of another party will not extinguish his lien. He can follow the property into the hands of the purchaser, whether notification of the mortgage were or were not given at the time of sale. Appeal dismissed with costs.

The 6th February 1865.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble Shumboonauth Pundit, *Judge*.

Appeal to Privy Council—Powers of High Court (Security from Respondent; suspension of decree).

Case No. 144 of 1865.

Petition praying that the appellant be called upon to furnish proper security for the due performance of such orders as the Privy Council may pass on the appeal, or that the execution of this Court's decree be suspended pending the appeal.

Nil Kishen Thakoor, (Respondent to England), *Petitioner*,

versus

Beer Chunder Thakoor Gossain (Appellant to England), *Opposite party*.

Baboos Juggadanund Mookerjee and *Chunder Kally Ghose* for Petitioner.

Mr. R. V. Doyne for Opposite party.

The plaintiff obtained a decree for possession of a zemindaree which was reversed on appeal by the High Court. The plaintiff then appealed to the Privy Council. Under such circumstances, the High Court has no power, under Section 4 Regulation XVI of 1797, to order security to be taken from the defendant, respondent, in the appeal to the Privy Council for the due performance of such orders as the Privy Council may pass in the appeal, or to suspend the decree reversing the decision of the first Court.

In this case the plaintiff obtained a decree which adjudged to him the possession of the zemindaree of Rowshanabad in the Court of the Principal Sudder Ameen of Tipperah; that decree was reversed by this Court in regular appeal. The plaintiff has appealed to the Privy Council, and prays that security may be taken from the defendant for the due performance of such orders as Her Majesty may make in the appeal, or that the execution of our judgment should be suspended pending the appeal to the Privy Council.

We are of opinion that we have no power to make such an order under Section 4 Regulation XVI of 1797. The first Clause of that Section empowers the Court to "order the judgment passed by them to be carried into execution" on "taking sufficient security from the party in whose favor the judgment may be passed." But that Clause does not apply, because in the present case there is no judgment which is to be carried into execution; the judgment of the Lower Court which would have altered the state of things existing prior to the commencement of the suit, having been simply reversed and annulled by the order of this Court. The second Clause does not apply. It empowers the Court to "suspend the execution of their judgment during an appeal, taking security from the party left in possession of the property adjudged against him." That relates to the case of a judgment awarding possession of the property, and by which the possession will be changed, and the party against whom the judgment is passed, is to be deprived of the property of which he was previously in possession by a judgment of the Court.

It was further contended that because, pending the appeal to this Court and subsequent to the decree of the Principal Sudder Ameen, the property was placed under attachment, the decree of this Court operated to reverse the attachment, and that the execution of it may be suspended by us pending the determination of the appeal to the Privy Council. There are two answers to this objection—*First*, that attachment was only ordered to continue pending the appeal to this Court; and *secondly*, it fell with the decree of the first Court, and was, in fact, actually set aside by an order by Mr. Justice Kemp made on the 29th of September last.

We must, therefore, reject this application for security with costs.

If the application had been simply for security to the extent of the decree so far as it applied to the costs, we might have acceded to its prayer.

The 13th February 1865.

Present:

The Hon'ble W. S. Seton-Karr and G. Campbell, *Judges*.

Special Appeal (from order rejecting rehearing of an appeal dismissed for default of prosecution).

Case No. 549 of 1864.

Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of Mymensingh, dated the 27th August 1864.

Ram Yad Jemadar, *Appellant,*

versus

Bissessur Bhuttacharjee and others, *Respondents.*

Baboo Luckhee Churn Bose for Appellant.

Baboos Sreenauth Doss and *Chunder Madhub Ghose* for Respondents.

An order passed under Section 347 Act VIII of 1859, rejecting an application for re-hearing of an appeal dismissed for default of prosecution, is substantially a decison in regular appeal. A special appeal lies from it.

THIS is a special appeal from an order passed under Section 347 of the Civil Procedure Code, rejecting an application for re-hearing. The appeal was first struck off for default. Within 30 days the appellant applied for a re-hearing, alleging sufficient reasons which prevented his appearance. The Principal Sudder Ameen received the application, ordered notice to be served and a day to be fixed, but apparently did nothing whatever till nearly 21 months later; he rejected the application without giving any reason whatever. It is argued that there is no appeal. But we think that a decision passed under Section 347 is substantially a decision in regular appeal; and that, therefore, if it be illegal, a special appeal will lie, although of course a regular appeal would not have lain. In this case, we think that, in wholly omitting to decide the real question at issue, and to give any reasons for the decision, the decision is, on the face of it, illegal and insufficient. We, therefore, remand the case, and direct that the Principal Sudder Ameen will again fix a day, and after hearing the parties and their proofs, will decide whether appellant has or has not shown sufficient reason for his former default, and give his reasons for his finding. We must strongly remark on the lose, careless, and dilatory procedure shewn in this case.

The 13th February 1865.

Present :

The Hon'ble W. S. Seton-Karr and G. Campbell, *Judges.*

Ex-parte decree—Application for re-hearing—Proof of service of summons.

Case No. 536 of 1864 under Act X of 1859.

Miscellaneous Appeal from an order passed by the Deputy Collector of Pubnah, dated the 27th June 1864.

Kashee Kant Chowdhry, *Appellant,*

versus

Beejoy Gobind Chowdry, *Respondent.*

Baboo Mohinee Mohun Roy for Appellant.

Baboos Romesh Chunder Mitter and *Opendur Chunder Bose* for Respondent.

Satisfactory proof of service of summons is necessary before the rejection of an application for re-hearing by a party against whom a decree was passed *ex-parte.*

THIS is an appeal from an order under, Section 58 Act X of 1859, rejecting an application for re-hearing by a party against whom a decree was passed *ex-parte.* We find that the order of the Lower Court is wholly unsupported and unjustifiable, for there is not in the record a tittle of proof of due service of summons. The case must go back to take proof whether the summons was duly served on the defendant according to law. If, after hearing the proof of service of summons, as well as the evidence brought to rebut it, the Court is satisfied that the summons was really duly served on the right party, that objection will fall to the ground. If there is any doubt about the due service, the defendant must be re-heard. Not mere formal proof, but real and satisfactory proof of service should be required.

We must also observe that there is a doubt regarding the construction of the original decree which the Deputy Collector has not touched. Appellant denies that the decree passed was a decree against him. In dealing with the case, this objection also should be satisfactorily disposed of.

The 13th February 1865.

Present :

The Hon'ble W.S. Seton-Karr and G. Campbell, *Judges.*

Execution of decree (Suspension of)—Cross-decree.

Case No. 623 of 1864.

Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of Tirhoot, dated the 1st August 1864.

Mr. John Smith, (Decree-holder), *Appellant*,

versus

Bulwunt Singh (Judgment-debtor),

Respondent.

Messrs. Robertson and *Payne* and *Baboo Onookool Chunder Mookerjee* for Appellant.

Baboo Luckhee Churn Bose for Respondent.

No appeal lies from the order of a Lower Court suspending the execution of one decree pending the result of an enquiry in a cross-decree held by the judgment-debtor.

THIS is a case in which the Lower Court has suspended the execution of one decree for about 2,000 Rupees held by the appellant, Mr. Smith, until the result of an enquiry into mesne profits in another or a cross-decree held by his debtor, Bulwunt Sing, shall have been determined.

We find, after hearing the appellant's two pleaders, that Mr. Smith, in his own decree, has purchased about 1,200 of the 2,000 Rupees from a third party, one Kanai Gir; and that for the remainder, or about 800 Rupees, he represents the interests of Messrs. Strahan and Inglis for the Factory of Hursingpore. In the cross-decree for wassilat held by Bulwunt Singh, Mr. Strahan is one of the judgment-debtors with several others.

We think, after advertence to Section 209 of Act VIII, and Section 11 of Act XXIII of 1861, that there is, correctly speaking, no appeal from such an order as that passed by the Lower Court, while is in the nature of an interlocutory order in which no final opinion has as yet been passed as to the actual amount of the set-off, and no point has really been determined.

But even granting that we could look into and alter the order, we find no cause for thinking the order of the Lower Court delaying one decree until the amount of the other had been correctly ascertained, at all indiscreet. The interests of Strahan, in both cases, are, to a certain extent, the same, and one decree should wait for the other.

While, however, we dismiss the appeal as untenable, we do not hesitate to express our opinion that the enquiry into the second decree must be conducted and concluded within a reasonable time. It must not be made the means of indefinitely suspending the first decree.

If then the enquiry into the wassilat be not terminated within six months from this date, we think that the Lower Court should pass fresh orders on any application by the present appellant, Mr. Smith, any previous order in the matter notwithstanding. With these remarks, we dismiss the appeal with costs.

The 14th February 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Widow (Succession of, as heir to her son)—Provision in husband's will for adoption of a son.

Cases Nos. 492 and 493 of 1864.

Miscellaneous Appeals from an order passed by the Judges of Rungpore, dated the 20th June 1864.

Dinoo Moyee Chowdhrain, *Appellant*,

versus

Mr. A D. C. Rehling, *Respondent.*

Mr. C. Gregory, and *Babbos Sreenath Doss* and *Kalee Prosunno Dutt* for Appellant.

Baboo Mohinee Mohun Roy for Respondent.

A, by his will, appointed a guardian to his son and widow, and directed that the son should not take the management of the property before his 20th year, and that, in the event of his death, the guardian should see that the widow adopted a son without delay. The guardian having died or declined to act,—HELD that, on the death of her son, the widow was entitled to succeed as his heir; the provission to adopt not being imperative.

THE deceased Kashee Chunder left a widow (the petitioner) and a minor son, and by his will appointed a guardian to his son and widow, on the ground that she was a purda-nusheen. He directed that his son should not take the management of the property till he had attained his 20th year; and in the event of his death, the guardian was to take care that the widow adopted a son without delay.

The parties named in the will as guardians died or declined to act; and, under the terms of the will, the Court appointed a manager on 20th July 1860. The son died in Aghran 1268 (December 1861); and the widow, as heir to her son, seeks to obtain possession of the property.

It is contended that, under the terms of the will, she cannot succeed to the management, though she may have the beneficial interest in the property. She has not adopted a son up to the present time, and cannot be compelled to make an adoption. If she fail to adopt, is there any thing in the terms of the will to prevent her succeeding to the

property, and taking the management as an ordinary heir? The death of her son has entirely altered her position. So long as he was alive, she had clearly no right to the management. After his death, she is legally entitled to succeed to the property. The instructions to the guardian requiring him to see that the widow adopted a son without delay, lead to the supposition that the testator did not contemplate any delay on the part of his wife to adopt; and, therefore, he made no provision for the removal of the manager, but supposed that the property would continue in her hands. The provision to adopt, however, is not imperative; and if the widow decline to adopt, we do not find any terms in the will prohibiting her taking possession in right as heir to her son. Under this view of the case, we reverse the order of the Court below, and decree this appeal, holding that the petitioner is entitled, as heir to her son, to succeed to the possession and management of the property. The parties will pay their own costs.

The 14th February 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Appeals to the Privy Council (Consolidation of)—Extension of time for appeal.

Application to be allowed to prefer one consolidated appeal to Her Majesty in Council against the decision of the High Court in Regular Appeals, Nos. 516, 517, 518, *and* 519 *of* 1863, *dated the* 20*th of April* 1864.

Pran Nath Roy Chowdhree, *Appellant to England,*

versus

Kasheenath Chowdhree, *Respondent to England,*

Baboo Thakoordoss Mookerjee for Appellant.

The High Court has no power to consolidate appeals to the Privy Council, or to admit appeals to the Privy Council in cases in which the time for filing an appeal has expired. Such consolidation or admission cannot be made without the permission of the Privy Council.

Deputy Registrar, 30*th November* 1864.—THERE were 4 money suits before the Lower Court for distinct amounts on which separate orders were recorded; and four separate appeals were prefered to this Court against these 4 orders. Three distinct decisions were passed by this Court; and the decision in No. 516 was held to govern the appeal No. 517. The appellant now appeals to the Privy Council in *one* petition against the decisions in the 4 appeals. As this appears to me to be irregular, I am unable to receive the appeal without the orders of the Court.

I may add that two of these cases are not appealable to the Privy Council; the amounts sued for being below the appealable amounts, *viz.*, Rupees 10,000.

Mr. Justice Shumboonath Pundit, on motion of the Appellant, 30*th November* 1864.—Let the petitions be received for the present. They are not to be considered as appeals received. If the appellant should ultimately be told to file 4 appeals, and be unable to file them in time, he cannot get any extension. The safest course was to file separate appeals in the cases appealable, and to move the Privy Council to amalgamate them, and to receive the appeals in the other cases not appealable, and to ask the same also to be amalgamated with the others. The Privy Council has power to grant all these requests when they see it reasonable. The petitioner is, however, at liberty to proceed as he is advised.

If the appellant does not like to file separate appeals, he must file precedents within a week to show that such has ever been done by this Court or the late Sudder Court and sanctioned by the Privy Council.

Deputy Registrar, 10*th December* 1864.—The appellant has filed a precedent (page 8, Summary Reports, Vol. 1, Russikloll Dutt, Petitioner) which is not of the kind he was required to furnish, and does not, it appears to me, apply to the case.

There is a case in Vol. IV, page 343 of Moore's Indian Appeals, which seems to bear on the application. The Privy Council held that, as there were two distinct cases and two separate judgments recorded in both the Courts below, and they were treated by the local Courts as separate and distinct actions, and in no stage consolidated, the Sudder Court was not competent to consolidate them for the purposes of appeal to England.

There is another Case in Vol. VII of Moore's Indian Appeals, p. 548, according to which the Privy Council, *on application*, directed the consolidation of 5 cases, *the amount involved in each being under the appealable value*, on the consent of the parties to abide by the decision of the Privy

Council in the first appeal as governing the other appeals. Thus, it would appear, that the Privy Council must be moved for orders to consolidate even in cases *under* the appealable value.

Since writing the above, the appellant has referred me to a case (p. 404, Vol. 1 of Moore's Privy Council Reports) in which the Privy Council *gave leave* to revive an appeal dismissed for want of prosecution, because the Court below had consolidated it with another appeal. But the fact remains, that the permission to consolidate must be obtained from the Privy Council.

Justices Loch and Seton-Karr, on reference by the Loazima Bench.—It appears that the petitioner instituted four separate suits for money against the same defendant. The transactions were entirely distinct from each other. Two of the claims were for sums in excess of Rupees 10,000, and the other two below that sum. On appeal to the High Court, all the suits were dismissed; and the petitioner then filed a petition of appeal to the Privy Council comprising in it all four cases, so making one appeal instead of four appeals. We do not think that this Court has any power to consolidate appeals in this manner, and that such consolidation cannot be made without permission of the Privy Council. It is to their Lordships that the petitioner must apply for permission to file his appeal in the mode in which he seeks to do it.

The petition of appeal he has filed in this Court will be sufficient to cover one of the cases, whichever the petitioner may select, but as the time for filing an appeal to the Privy Council in the other cases has expired, we have no authority for admitting the appeals now. Application for permission to appeal should be made to their Lordships in Privy Council.

The application is rejected.

The 20th February 1865.

Present:

The Hon'ble W. S. Seton-Karr and Shumboonath Pundit, *Judges.*

Costs—Vakeel's fees (in Lower and Appellate Court).

Cases Nos. 643, 644, and 645 of 1864.

Miscellaneous Appeals from an order passed by the Principal Sudder Ameen of the 24-Pergunnahs, dated the 29th August 1864.

Nawab Hajee Mahomed Khan (Decree-holder), *Appellant,*

versus

Allanowazee Begum and others (Objectors), *Respondents.*

Moonshee Ameer Ali Khan Bahadoor for Appellant.

Mr. R. E. Twidale for Respondents.

In the Lower Court vakeel's fees are allowable only once for all; whereas in the Appellate Court separate costs are allowable for every time that appearance is entered on behalf of the winning party on remand or in review.

THE Lower Court is wrong in these three cases. According to the usual rule and practice of our Court, costs follow the ultimate result of the case, and petitioner then becomes entitled to the costs of the vakeel for every time that an appearance was entered on his behalf on remand or in review. By this we mean that the appellant is entitled to the costs of his vakeel for every occasion when the said vakeel appeared in the Appellate Court, and a review or a remand was ordered. In the Lower Court, however, the costs of the vakeel must be calculated once for all, or as if the case were there, from first to last, one case. He cannot get separate costs for each appearance in the Lower Court after remand, though he may obtain them in the Appellate Court.

The order of the Lower Court will be amended accordingly, and the appellant will get the costs of these appeals also.

The 20th February 1865.

Present:

The Hon'ble W. S. Seton-Karr and Shumboonath Pundit, *Judges.*

Fraudulent decree—Decree for maintenance in favor of Hindoo woman (Priority of).

Case No. 654 of 1864.

Miscellaneous Appeal from an order passed by the Judge of Sarun, dated the 31st August 1864, *reversing an order passed by the Sudder Ameen of that District, dated the 6th August* 1863.

Joorawun Singh (Decree-holder), *Appellant,*

versus

Musst. Jhoota (Objector), and another (Judgment-debtor), *Respondents.*

Baboo Kalee Kishen Sein for Appellant.

None for Respondents.

A Court may try the issue of fraud under Section 272 Act VIII of 1859 without any charge of fraud against the decree appealed from.

A Hindoo woman holding a decree for maintenance against a person who has no other property besides the one, the proceeds of which are in dispute, is entitled to a preference over any other judgment-debtor.

BOTH the Lower Courts have found as a fact that the decree obtained by the petitioner was conclusive, and against that finding we cannot interfere in special appeal.

The pleader for the petitioner further argues that, under Section 272 of Act VIII of 1859, in the absence of any charge of fraud against the decree of his client, the Courts below should not have tried this issue of fraud. We do not, however, read the Section above mentioned as he construes it. Further, in equity, a Hindoo woman holding a decree for maintenance against a person who has no other property besides the one, the proceeds of which are at present in dispute, is justly entitled to a preference over any other judgment-creditor. The special appeal is accordingly dismissed with costs.

The 21st February 1865.

Present:

The Hon'ble W. S. Seton-Karr and Shumbhoonath Pundit, *Judges.*

No Special Appeal (from order confirming or setting aside sale in execution of decree).

Case No. 656 of 1864.

Miscellaneous Appeal from an order passed by the Judge of Sarun, dated the 26th

August 1864, *affirming an order passed by the Sudder Moonsiff of that District, dated the 29th January* 1864.

Bhujun Ram Tewaree and others (Judgment-debtors), *Appellants*,

versus

Lalla Ojoodhya Pershad and others (Auction-purchasers), *Respondents.*

Baboos Kishen Sucoa Mookerjee and *Goopeenath Mookerjee* for Appellants.

Messrs. R. T. Allan and *J. Baptist*, *Moonshee Ameer Ali Khan Bahadoor*, and *Baboo Unnoda Pershad Banerjee* for Respondents.

A special appeal does not lie from an order passed under Section 257 Act VIII of 1859, confirming or setting aside a sale in execution of a decree.

In this case Mr. Allan takes an objection for the respondent that there is no appeal. The order complained of was passed under Section 257 of the Code of Civil Procedure: and on referring to the decision of the Full Bench of five Judges of the 19th of February 1863, No. 309 of 1862, case of Mahomed Hossein, we find it clearly laid down in the conclusion of the judgment, that a special appeal, such as the present, will not lie from an order passed under the Section quoted.

This is definite and conclusive, and we have only to dismiss the appeal with costs.

The 27th February 1865.

Present:

The Hon'ble C. B. Trevor, H. V. Bayley, J. P. Norman, W. Morgan and F. B. Kemp, *Judges.*

Joint Hindoo family dwelling-house (Right to share of—in execution of decree).

Case No. 353 of 1864.

Miscellaneous Appeal from an order passed by Mr. A. Pigou, Judge of Hooghly, dated the 30th April 1864.

Koonwur Bijoy Keshub Roy Bahadoor, *Appellant*,

versus

Shama Soonduree Dossee and others, *Respondents.*

Mr. R. T. Allan and *Baboo Nil Madhub Sein* for Appellant.

Baboos Kishen Kishore Ghose, Sreenath Doss and *Dwarkanath Mitter* for Respondents.

A person who, at a sale in execution of a decree, has purchased the share of a member of a joint undivided Hindoo family, and, subsequently sued for and obtained a decree against other members of the family for possession of such share in property consisting of the joint family dwelling-house, and land in execution of the decree, is entitled to be put into actual possession of a portion of the dwelling-house *(dissentiente* Kemp, J).

On the 6th of July, A. D. 1849, the plaintiff purchased a 6-anna 8-gundah share, being the share of Sheonath and Mothoornath Mullick, sold in execution of a decree against them. Being unable to obtain possession, he brought a suit for possession of the share so purchased. After a prolonged litigation, and remand upon a special appeal by the late Sudder Court, a report of which appears in the decisions for 1859, page 725, on the 14th December 1860, he obtained a decree declaring him, as purchaser of the interests of Sheonath and Mothoornath, entitled to possession of a 6-annas 8-gundah share of the 8-annas of Ramtonoo. In execution of this decree the Nazir returned that he gave the plaintiff possession by putting up a bamboo. The plaintiff insisted on having actual possession, but this the Nazir did not allow.

By a petition, dated 14th September 1861, Shama Soonduree, who, as widow of Juggurnath Pershad, was entitled to 8 annas of the whole property, alleged that her husband had a defined 8 annas share, and consequently that the plaintiff could not obtain possession of any portion of that defined share.

The Lower Court decided this question against her, and in favor of the plaintiffs; but went on to say that, when "decreedar, a stranger, wishes the Court to put him in actual possession of a share of a Hindoo family homestead, the Court find that there is a difficulty, as such taking of actual possession would, undoubtedly, cause much injury to the family already residing there," and accordingly directed that the appellant should have actual possession of his share of the lands, and possession of the share of the buildings, as under Section 224 of Act VIII of 1859.

The case was referred to a Full Bench by Mr. Justice Loch and Mr. Justice Seton-Karr, to determine the question, whether the plaintiff was entitled to be put in actual possession of his share in the dwelling-house.

We think it quite clear that Section 224 has no application to the present case. The

petitioner Shama Soonduree is not a "person entitled to occupy" the house as against the plaintiff, who has obtained a decree for possession against her.

The case of Ramtonoo Chatterjee *versus* Gobindo Chunder Chatterjee, Sudder Dewanny Adawlut, 1857, page 1585, is a direct authority, if any be needed, to show that the plaintiff, as purchaser in the execution of a decree, is entitled to actual possession of that which he has bought. If the petetioner is subjected to any inconvenience, she has only herself to blame. She might have purchased the shares of the execution debtors at the sale, or sued for partition, instead of resisting to the uttermost the claim of the purchaser, and setting at defiance the decrees of the Court. In the case of Kesubnath Ghose *versus* Hur Gobind Bose, S. D. A. Rep. 1853, page 768, the Court pointed out that, in execution of the decree, an Ameen may divide joint property upon the same principle as that on which butwarras are made, and on that principle possession of a portion of the dwelling house equivalent to a 6-annas 8-gundah share must be set apart, and be given to the plaintiff, the apportionment being made in such a way as to cause the least possible inconvenience to the defendants.

Mr. Justice Kemp.—This case has been referred to a Full Bench of this Court. Mr. Justice Seton-Karr was inclined to concur in the decision of the Zillah Judge, as he thought it would be inconvenient to give the decree-holder, a stranger, a right of actual tangible entry into a dwelling house occupied by a respectable Hindoo female. He was further of opinion that the decree-holder must be content with the ordinary possession of the buildings under Section 224 of the Civil Code, which would entitle him to rent for the same, unless he could come to some arrangement with the resident therein, who, it appears, is willing to buy him out.

Mr. Justice Loch, observing that there were two reported decisions of the late Sudder Court opposed to each other, thought it right to send the case up for an authoritative ruling of a Bench of five Judges.

It appears that the decree-holder purchased in execution a 6-annas 8-gundah share belonging to his judgment-debtor in a joint undivided Hindoo family dwelling house, with the premises attached thereto. He then sued for possession and obtained a decree, awarding to him possession of the aforesaid share in the buildings and in the lands surrounding the buildings. The question now before us is, how this decree is to be executed? The decree-holder asks for a share equal to 6-annas 8-gundahs in every room and corner. This much, however, my learned colleagues are not prepared to allow. I think with reference to Hindoo customs and prejudices, that it would be inequitable to permit a stranger to intrude himself upon a privacy of a joint Hindoo family residence, more particularly when, as in this instance, a stranger is actuated by motives of enmity. The decree-holder, in suing for possession, valued the land round the house at three times that of the house itself, and yet he refuses, though the opposite party are willing to take his share out of the land, but insists upon intruding upon the house. If we permit him to do this, we shall be encouraging the decree-holder in his animosity, and be driving the other members of the family to leave their ancestral house.

I would direct the Court below to depute an Ameen to mark off in one spot from the land attached to the house, a 6-annas 8-gundah share, with an equivalent in value of a share of that extent in the house to be taken from the land.

The 27th February 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

No Appeal (from order in execution of decree).

Nos. 525, 526, 527, and 528, of 1864.

Miscellaneous Appeals from an order passed by the Deputy Collector of Tirhoot, dated the 19th July 1864.

Kishen Bullubb Mohunt and another, Judgement-debtors, *Appellants,*

versus

Baboo Konessur Singh (Deeree-holder), *Respondent.*

Mr. C. Gregory for Appellants.

Baboo Dwarkanauth Mitter for Respondent.

No appeal lies from an order passed after decree and in execution thereof.

THE appeals in the above cases cannot be admitted, for they relate to orders passed by a Collector in execution of decrees for rent; and the Full Bench decision of 16th March 1864 (Ruttun Monee Dossee, appellant,) ruled that there is no appeal in respect of orders passed after decree and in execution thereof. We therefore dismiss these appeals with costs.

The 27th February 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Women of rank—Exemption of, from arrest in execution of decree.

No. 706 of 1864.

Miscellaneous Appeals from an order passed by the Officiating Judge of Nuddea, dated the 14th September 1864 *affirming an order passed by the Moonsiff of that District, dated the 5th April* 1864.

Rookinee Soonduree Debee (Decree-holder), *Appellant,*

versus

Heeramotee Debee (Judgment-debtor), *Respondent.*

Baboos Goopeenauth Mookerjee and *Lukhee Churn Bose* for Appellant.

None for Respondent.

Women of rank are exempted from arrest in execution of decree.

IT has been held by the majority of a Full Bench that women of rank are exempted from arrest in execution of decrees; and in conformity with that decision we reject this appeal with costs.

The 27th February 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

No appeal (from order of Judge refusing to recognize purchaser of decree).

Case No. 453 of 1864.

Miscellaneous Appeal from an order passed by the Judge of Sarun, dated the 23rd June 1864, *affirming an order passed by the Principal Sudder Ameen of that District, dated the 25th July* 1863.

Lalla Ojhee Loll (Purchaser of Decree), *Appellant,*

versus

Syed Lootf Ali Khan and others (Judgment-debtors), *Respondents.*

Baboo Kalee Kishen Sein for Appellant.

Messrs. R. E. Twidale and *J. Baptist* for Respondents.

No appeal lies from an order of a Judge refusing to recognize the position of a purchaser of a decree.

THE Court of first instance refused to recognise the poistion of the applicant, a purchaser of a decree. The Judge decided that no appeal from this order lay to him and refused to interfere.

The pleader for the appellant fails to show us any Section giving him the right to appeal to the Judge, or any law or precedent to prove that the Judge was wrong in his conclusion.

Under these circumstances, we have only to dismiss the appeal with costs.

The 27th February 1856.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Review (of ex-parte judgment).

No. 714 of 1864.

Miscellaeeous Appeal from an order passed by the Principal Sudder Ameen of Dacca dated the 23rd September 1864.

Motee Chand Baboo, *Appellant,*

versus

Radha Madhub Chund Baboo, *Respondent.*

Baboo Hem Chunder Banerjee for Appellant.

Moulvie Aftabooddeen Mahomed for Respondent.

Section 376 Act VIII of 1859 (relating to review of judgment) applies to cases heard and decided in the presence of both parties, but not to the case of a person coming in under Section 119 and alleging that he had no knowledge of the suit.

THE Lower Court is wholly wrong in treating the application for review under Section 376. This Section applies to cases heard and decided in the presence of both parties. But here the applicant comes in under Section 119, alleging that he had no knowledge of the suit. He should, obviously, have been allowed an opportunity of proving to the Court's satisfaction that the summons was not duly served on him, or that he was prevented from appearing from some good and sufficient cause.

We annul the order of the Lower Court, and direct that the Principal Sudder Ameen do take up the case, consider the application under Section 119 on its merits, and pass such orders as justice may require.

The 6th March 1865.

Present:

The Hon'ble J. P. Norman and Shumboo-Nath Pundit, *Judges.*

Special Miscellaneous Appeal—Filing of, out of time after bringing regular suit.

Miscellaneous Appeal from an order passed in the Execution Department by Mr. R. Abercrombie, Judge of Dacca, dated the 6th December 1862, *affirming an order passed by Mr. F. C. Pennington, Sudder Ameen of that District, dated the 11th April* 1862.

Kalee Kishore Sein (Judgment-debtor), *Appellant,*

versus

Nilambur Sein *alias* Nilmoonee Sein (Decree-holder), *Respondent.*

Baboo Mohinee Mohun Roy for Appellant,

None for Respondent.

The appellant being entitled to appeal specially from an order of the Lower Court in the Execution Department, instituted a regular suit to set aside the order. Having elected that remedy, his present application to file a special miscellaneous appeal, out of me, was rejected.

THIS is an application to admit a Special Miscellaneous Appeal 2 years, 2 months and 28 days after the order in the Execution Department, which is appealed against. By a decision of this Court on the 19th of February 1863, it was settled that a special appeal lies in a case like the present. But the applicant, instead of taking that course, brought a regular suit, which has been pending, until recently, to get rid of the order.

He has elected one remedy; and we cannot now, in order to enable him to try another, allow him to file a special appeal out of time.

The application is rejected.

The 9th March 1865.

Present:

The Hon'ble Sir Barnes Peacock, Kt., *Chief Justice*, and the Hon'ble C. B. Trevor, G. Loch, H. V. Bayley, C. Steer, J. P. Norman, F. B. Kemp, W. S. Seton-Karr, Shumboonauth Pundit, G. Campbell, J. B. Phear, E. Jackson, F. A. Glover and A. G. Macpherson, *Judges*

Time for presenting petition of appeal—Time of pendency of application for review to be excluded; but petition of appeal to be filed immediately after rejection of application for review.

Nobbo Kissen Sing,

versus

Kaminee Dossee.

A petition of appeal is presented in time if presented within the time limited for appealing exclusive of the time during which the application for a review of judgment was pending. The petition of appeal should be presented immediately after the application for a review is rejected.

The Advocate-General asked for the opinion of the Court whether the period for appeal should not be calculated from the date of an order rejecting a review of judgment, instead of from the date of the original judgment. If his view be not adopted, he then asked whether, as an ordinary rule, subject to exceptions in special cases, the period during which the review was pending should be deducted from the period allowed for appeal.

The Chief Justice.—This is an application to enlarge the time for filing an appeal against a decree, and not to lodge an appeal against an order rejecting a review of judgment, even if an appeal would lie against such an order.

The question arises whether the petitioner has brought his application in time; and if not, whether there are reasonable grounds for the Court to enlarge the time.

Rule 34 says:—

"An appeal from a decree or appealable "order which shall be made after the passing "of these Rules by a Judge or Division Court "in the exercise of Ordinary Civil Jurisdic-"tion, shall be presented within twenty "days from the date of such decree, and "within four days from the date of such "order. In reckoning the time, the date of "the decree or order shall be excluded. "The time may be enlarged upon sufficient "cause shewn to the satisfaction of the "Appellate Court for not having presented "the appeal within such limited period."

Let us see whether the present application has been made within the proper time

The decree was pronounced on the 5th February. 30 days were allowed to the plaintiff to appeal or to apply for a review of judgment. The plaintiff took the whole of his 30 days; and on the 8th March he filed a petition for review. The petition was not heard until the 23rd December, when it was rejected. From the 8th March until the 23rd December the case was tied up by the petition for review. It was not until 19 days afterwards that the plaintiff presented his petition of appeal.

It appears to us that the petition was not made within proper time. It certainly was not made within 20 days from the date of the judgment or decree, or within such period of 20 days exclusive of the time during which the application for a review of judgment was pending.

The Madras Sudder Court held that, if a party presents an application for review of judgment within the time limited for appealing, the period occupied by the Court in disposing of such application will not be reckoned among the number of days limited for appealing, but will be added thereto, and a memorandum of appeal presented within such extended period will be received as put in within time. We think that that rule is a correct one, and consequently that this appeal has not been presented within the time allowed by law.

The question then arises whether sufficient cause has been shown to the satisfaction of the Court for not having presented the appeal within the limited period. Sitting as an Appellate Court for the purpose of hearing this application for extension of the time to appeal, I hold that no sufficient cause has been made out. The plaintiff had not only 20 days, but he had 30 days for representing his petition of appeal on review. At the end of those 30 days he presented a petition for reveiw, and after that petition was rejected he took 19 days further before he presented his petition of appeal. It seems to me that he ought to have presented his petition of appeal immediately after the petition of review was rejected. Instead of that, he took as much time, with the exception of one day, after the petition for review was rejected, as he would have had if the decree had been only then pronounced. It is not because the plaintiff shows that this is not a case of appeal for delay, that he makes out his case under the provisions of Rule 34. The Rule does not say that the time shall be enlarged if the Court shall be satisfied that the appeal is not for the sake of delay, but that it may be enlarged if sufficient cause be shown to the satisfaction of the Court for not having presented the appeal within the time limited by the rules of the Court.

This has not been shown to my satisfaction, and under these circumstances the application must be rejected.

The 10th March 1865.

Present:

The Hon'ble E. Jackson, *Judge.*

Stamp Duty (Refund of deficient, and penalty)—Appeations how to be made.

Case No. 43 of 1865.

Miscellaneous Appeal from an order of the Principal Sudder Ameen of Midnapore, dated the 16th November 1864, passed on an application for refund of rupees 1,500, paid on account of deficient stamp and penalty upon a deed of gift.

Mohunt Ramanooj Doss, *Appellant,*

versus

Government, *Respondent.*

Baboos Unnoda Pershad Banerjee and *Mohendro Lall Shome* for Appellant.

An appeal does not lie from an order of the Lower Court made on an application for refund of deficient Stamp Duty and Penalty, after a case remanded to it, had been compromised. Redress should be sought by way of motion rather than as an appeal.

Quære.—Whether the penalty is returnable.

Deputy Registrar.—THERE is some reason for doubting whether an appeal like this will lie.

The Lower Court, as held in a previous decision of this Court on the file, acted erroneously, *after* the case remanded to it had been compromised by the parties, in proceeding to try it under the order of remand, and to compel the appellant to pay for deficiency of stamp and penalty, instead of to dispose of it under Section 98 Act VIII of 1859.

This Court, accordingly, in affirming the decision of the Lower Court *on remand, declared* that the order passed by it, prior to the decree, relating to the payment of Stamp Duty and Penalty, and to the trial of the suit on remand, was, under the circumstances, erroneous, and that the appellant was entitled to a refund, and was competent to take such measures as he might be advised, or he might deem proper, for procuring the same.

The appellant the reupon petitioned the Lower Court for the refund.

The Lower Court rejected this petition, and declared itself incompetent to order the refund, "especially as the fine had not only "already been carried to the credit of Go- "vernment, but also entered as actual re- "ceipts in the Budget estimates."

The present appeal is against this order. Should it be admitted and registered, and the papers from the Lower Court called for?

Order.

This should be brought before the Court by way of motion rather than as an appeal. I see no reason to interfere in the Principal Sudder Ameen's order. The Judges did not order the return of the fine; and there seems to be great doubt as to whether the plaintiff is entitled to have it returned.

The 10th March 1865.

Present:

The Hon'ble E. Jackson, *Judge.*

Notice on Respondents—Re-issue of.

No 515 of 1864.

Miscellaneous Appeal against an order of the Deputy Commissioner of Gowalparah, dated the 7th June 1864.

Ram Lochun Sircar Surburkar, *Appellant,*

versus

Prithee Ram Chowdhry and others, *Respondents.*

Messrs. C. Gregory and *G. Gregory* for Appellant.

Baboo Debendro Narain Bose for one of the Respondents.

Before a notice on a respondent can be re-issued, an application must be made to the Court detailing the grounds on which it is preferred.

Deputy Registrar.—THIS is a return to notices to respondents issued from this Court. The Lower Court reports service on certain of the respondents, and failure of service on certain others of the respondents owing to their residence not being traced.

According to existing practice, I called upon the pleader of the appellant to furnish needful information for re-issue of the unserved notices, and allowed him, as usual, a week to do so.

The pleader asks for 22 days from to-morrow, to enable him to obtain the information from his clients in Gowalparah (Assam), and cites another case in which it was allowed.

I reluctantly granted 22 days, on the occasion referred to, to the same pleader, to enable him to procure similar information from a district in Assam, and told him that I granted his request as a special case.

I doubt whether an appellant is entitled to an indulgence like that now sought. He is required, I presume, to watch the progress of the service, and to supply all needful information to the serving officer to complete it. In this case, the appellant might have procured and furnished the information that he is now required to supply, to the Lower Court, and prevented the failure, and the report thereof; or, if the time allowed for the service had expired, he might have supplied the information to his agent here, and enabled him to answer the call within the usual period allowed, *viz.*, one week. I do not think, therefore, that he is entitled to more time.

Were such indulgences allowed as a rule (and frequent repetitions of them would give them the sanction of a rule), an appellant might postpone the completion of an appeal for hearing by the Court for any period suitable to him.

I doubt, moreover, whether I can, of myself, grant the indulgence; and as such applications are becoming more frequent of late, I beg the orders of the Loazima Bench on this application.

I take this opportunity of bringing the following to the notice of the Court, though not exactly connected with the matter in hand.

The Deputy Registrar used, on the application of an appellant in a case where the return of a Lower Court was made before the date fixed for the hearing of an appeal, as provided in Section 244 Act VIII of 1859, to direct, without reference to the Court, the re-issue of a notice not served, owing to the failure of the appellant to deposit *tullubana*, &c.

I considered that practice to be beyond the power of the Deputy Registrar, and ordered it to be discontinued. The practice now established in its place, is to refer all such cases for the orders of the Loazima Bench.

ORDER.—It appears to me that no sufficient ground appears on this record to require this Court to assent to the re-issue of notices on respondents. Before such notices can be re-issued, some application must be made with

that view, detailing the grounds on which it is preferred.

In this case, the appeal can go on as respects the parties on whom notices have been served.

The 11th March 1865.

Present:

The Hon'ble H. V. Bayley and W. S. Seton-Karr, *Judges.*

Appeal—Bona fide purchaser of decree.

No. 716 of 1864.

Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of Bhaugulpore, dated the 26th February 1864.

Chundee Pershad Misser, *Appellant,*

versus

Rajah Nilanund Singh, *Respondent.*

Baboo Luckhee Churn Bose for Appellant.

Baboo Unnoda Pershad Banerjee for Respondent.

An appeal is not open under Section 11 Act XXIII of 1861 to the person who is found by the Court below not to be a *bonâ fide* purchaser of a decree for valuable consideration.

IN this case the respondent takes the preliminary objection that the appeal cannot be heard under Section 11 Act XXIII of 1861, inasmuch as the petitioner has not been found by the Court below to be a *bonâ fide* purchaser of the decree for valuable consideration; and that, until this be found the petitioner cannot be treated as one of the parties to the suit, or the real representative to whom Section 11 allows a right of appeal as a party to the suit.

We think this objection valid; and we remand the case in order that the Lower Court may come to a clear and distinct finding whether the petitioner is a *bonâ fide* purchaser for value consideration of the decree of the decree-holder who was a party to the suit, and is thus really and truly a representative of a party in the suit.

Remand accordingly.

The 11th March 1865.

Present:

The Hon'ble E. Jackson, *Judge.*

Time for appeal—Deduction of what time for obtaining copies of judgment and decree.

No. 590 of 1865.

Special Appeal from a decision passed by Mr. E. S. Pearson, Judge of Tirhoot, dated the 19th November 1864, *reversing a decision passed by Moulvie Syud Emdad Ali Khan, Principal Sudder Ameen of that District, dated the 22nd February* 1864.

Baboo Nursingh Narain Singh and others (Plaintiffs), *Appellants,*

versus

Baboo Radhay Singh and others (Defendants), *Respondents.*

Mr. J. Baptist for Appellants.

None for Respondents.

An appellant must not make unnecessary delay by asking for copies of judgment and decree on different dates. He is in time, if the time requisite for obtaining a copy of the judgment is taken into consideration independently of the time occupied in obtaining a copy of the decree.

Deputy Registrar.—THE judgment of the Lower Court was delivered on the 19th of November 1864. The stamp for a copy was filed on the 7th of December, and on the 10th the copy was ready for delivery.

The stamps for a copy of the *decree* were filed on the 10th of January 1865, and on the following day, the 11th, the copy was delivered to the appellant.

The appellant urges that the time requisite for obtaining the copy of the judgment must be excluded from the reckoning of the ninety days allowed for appeal.

The law (Section 363 Act VIII of 1859), however, provides that the time for appealing to the High Court "shall be reckoned "from and exclusive of the day on which "judgment was pronounced, and also exclu-"sive of such time as may be requisite for "obtaining *a copy of the decree* appealed "against."

If the letter of the law be applied to this case, the appellant is out of time.

But as Section 373 Act VIII of 1859 provides that *special appeals* "shall be ac-"companied by *copies of the judgment and decrees,*" the time requisite for obtaining a copy of the judgment must *also*, I presume, be excluded from the reckoning of the period for appeal, in which case this appeal would be in time.

I beg orders on the following points:—

1*st.* Whether the time requisite for obtaining a copy of a *judgment* is to be

excluded, as well as the time requisite for obtaining a copy of a *decree*, from the reckoning of the period of appeal.

2nd. Whether the time requisite for obtaining a copy of a decree, when (as in the present case) the application *is not filed simultaneously* with the application for a copy of a judgment, but some time after, is to be *added to the time requisite* for obtaining a copy of a judgment, and excluded from the reckoning of the period of appeal.

In the present case, supposing the second point to be answered in the affirmative, the time to be excluded from the reckoning of the period of appeal would be four days for a copy of the judgment, plus two days for a copy of the decree, total six days; whereas the case may have been different had both applications been filed simultaneously.

ORDER.—The law says that the appellant is entitled to have a deduction of the "time "requisite for obtaining a copy of the decree "appealed against," in calculating the time within which his regular appeal is lodged; and in special appeal also the time *requisite* for obtaining the copies of the judgments as well as decrees may be allowed for. But an appellant will not be allowed any more time than is really *requisite* for the purpose. He must not make unnecessary delay by asking for the copies on separate dates. In the present case, the appellant is in time if the four days, which elapsed while he was obtaining a copy of the judgment, are taken into consideration, independently of the time which elapsed in obtaining a copy of the decree. The appeal should, therefore, be admitted.

The 12th March 1865.

Present:

The Hon'ble H. V. Bayley and W. S. Seton-Karr, *Judges.*

No Special Appeal (from order in Appeal confirming a sale).

Case No. 712 of 1864.

Miscellaneous Appeal from an order passed by the Judge of Backergunge, dated the 27th September 1864, *affirming an order passed by the Principal Sudder Ameen of that District, dated the 20th August* 1864.

Muddun Mohnn Roy Chowdhry (Judgment-debtor), *Appellant,*

versus

Ram Chunder Goopto, guardian of Chundee Churn Roy, minor, (Decree-holder), *Respondent.*

Mr. C. Gregory and *Baboo Kishen Mookerjee* for Appellant.

Baboos Gopal Lol Mitter and *Kalee Mohun Doss* for Respondent.

Under Section 257 Act VIII of 1857 no special appeal lies from an order in appeal confirming a sale.

A PRELIMINARY objection is taken to the hearing of this appeal, on the ground that the order in appeal, which confirms the sale, is final under Section 257; and we find the objection valid.

This has been already ruled by the decision of a Full Bench of five Judges, dated the 9th of February 1863; and the rule has been since acted on. The appellant, having had his regular appeal, has legally no grounds of special appeal, and his case is, accordingly dismissed with costs.

The 14th March 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Property of Judgment-debtor—Admission of possession by Heir—Onus probandi.

Case No. 689 of 1864.

Miscellaneous Appeal from an order passed by the Judge of Beerbhoom, dated the 10th September 1864, *affirming an order passed by the Moonsiff of that District, dated the 19th July* 1864.

Matunginee Debea (Decree-holder), *Appellant,*

versus

Gugun Chunder Bhooy and others (Judgment-debtors), *Respondents.*

Baboo Tarucknauth Sein for Appellant.

None for Respondents.

Where an heir of a deceased judgment-debtor admits possession of some of the latter's property, the onus is on the heir (and not on the decree-holder) to prove the extent of that property.

THE decree-holder sued out execution, and one of the heirs of the judgment-debtor admitted possession of some of the debtor's property. The Lower Courts required the decree-holder to prove the extent of that property, and, as he failed to do so, rejected his application. We think that both the Lower Courts were wrong. As the heir admitted possession, it was for him to show the extent of the judgment-debtor's property that had found its way into his hands. We reverse the order of both Courts with costs.

The 14th March 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

No Appeal to Judge (in dispute between rival decree-holders).

Case No. 709 of 1864.

Miscellaneous Appeal from an order passed by the Judge of Sarun, dated the 19th September 1864.

Afzulonissa Begum and others (1st Party Decree-holders), *Appellants,*

versus

Parbutty Koonwur and others (2nd Party Decree-holders), *Respondents.*

Mr. J. Baptist and *Moonshee Ameer Ali* for Appellants.

None for Respondents.

No appeal lies to the Judge in a case where the dispute is not between parties to the suit, but between rival decree-holders in respect to the proceeds of property sold in execution of a decree.

THERE was no appeal to the Judge in such a case as this, for the dispute is not between parties to the suit, but between rival decree-holders in respect to the proceeds of property sold in execution of a decree. *See* the Full Bench decision of 1st June 1863, printed in Marshall's Reports page 527. The Judge's order is reversed. Petitioner will get her costs.

The 20th March 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Execution of decree (Applicability of Section 206 Act VIII of 1859)—Adjustment or payment not made through Court—Settlement with one of several decree-holders (Effect of, on the others).

Case No. 262 of 1864.

Miscellaneous Appeal from an order passed by the Judge of Nuddea, dated the 21st April 1864, reversing an order passed by the Sudder Moonsiff of that District, dated the 7th September 1863.

Bykunt Ghose and another (Judgment-debtors), *Appellants,*

versus

Kishen Chunder Ghose and others (Decree-holders), *Respondents.*

Baboo Anund Gopal Paleet for Appellants.

Baboo Doorga Doss Dutt for Respondents.

Section 206 Act VIII of 1859 applies where execution is sought after that law of a decree passed before its enactment.

No credit can be given for sums paid under a decree when the adjustment was not certified to the Court, nor payment made into Court.

A settlement with one of several decree-holders without the knowledge or consent of the others is not binding on them.

THERE were three decree-holders. The judgment-debtors settled with one of them for 80 rupees out of Court and paid 40 rupees. Execution is now taken out by the other decree-holders, and the adjustment is pleaded by the defendant judgment-debtors.

The Judge is right in considering that Section 206 of Act VIII of 1859 is applicable to this case, though the decree was passed some years before the enactment of that law, for execution has been sought subsequent thereto; and as the adjustment was not certified to the Court, nor payment made into Court, the defendants cannot receive credit for any sums they have paid. Further, where there is a decree held by three decree-holders, a settlement with one of the number without the knowledge or consent of the other two, cannot bind them. We reject the appeal with costs.

The 20th March 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Assam—Limitation—Suit to enforce decree.

Case No. 515 of 1864.

Miscellaneous Appeal from an order passed by the Deputy Commissioner of Gowalparah, dated the 7th June 1864.

Ram Lochun Sircar Surburakar (Decree-holder), *Appellant,*

versus

Prithee Ram Chowdhry and others (Judgment-debtors,) *Respondents.*

Messrs. C. Gregory and *G. Gregory* and *Baboo Judoonath Mookerjee* for Appellant.

Baboo Kalee Kishen Sein for Respondents.

Act XIV of 1859, on its extension to Assam, having superseded the local rules current in that Province, the time for enforcing a decree under Section 20 of that Act is 3 years.

THIS is an application for the execution of a decree of the late Sudder Court, dated 30th December 1861. Application for execution was made on 7th January 1864. Under the ordinary law, the application is within time. But it is pleaded that, under the Assam Rules, execution should have been taken out within one year from the date of the decree, and the Lower Court has held that the Assam Rules are still in force and binding on the Courts, and the Judge, therefore, dismissed the application.

Now, it appears that the new Law of Limitation, Act XIV of 1859, was extended to Assam by a special notification published in the *Calcutta Gazette* of 25th August 1860, and dated 11th July 1860. The operation of that law was suspended till the end of 1861; and this application for execution was put in after the expiry of two years from that law coming into operation.

Section 24 of the act provides that, whenever the Act is extended to any non-Regulation Province by the local Government, all suits which within such Province shall be

pending at the date of the notification, or shall be instituted within the period of two years from the date thereof, shall be tried and determined as if this Act had not been passed; but all suits to which the provisions of this Act are applicable, that shall be instituted within such Province after the expiration of the said period shall be governed by this Act and by no other Law of Limitation, any Statute, Act, or Regulation now in force notwithstanding.

It is clear then that this law, Act XIV of 1859, could not, under any circumstances, come into operation till the expiry of two years from the date of the notification extending its provision to Assam, *viz.*, 11th July 1860. These two years expired on 11th July 1862, and though the Act came into general operation throughout India from 1st January 1862, it could not, under any circumstances have effect in Assam till the July following.

Now, the decree sought to be executed in this case, bears date the 30th December 1861, and under the old Assam Rules execution should have been sued out on or before 30th December 1862; but before that date the new law had come into operation in Assam and thus the old rules were set aside by the law. Section 20 Act XIV of 1859 allows a party three years to enforce a decree from the date of judgment; and in this case the decree-holder has sued out execution within that period, and is, therefore, entitled to have the assistance of the Court in recovering what has been decreed to him. There cannot be two general laws of limitation applicable in one Province, and there can be no doubt that, when the Act of 1859 was extended to Assam, its provisions superseded the local rules current in that Province. Under this view of the case, we reverse the decision of the Lower Court, and decree the appeal with costs.

The 31st March 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Appellate Court (Interference by, in matters arising out of final orders).

Case No. 663 of 1864.

Miscellaneous Appeal from an order passed by Mr. O. Toogood, Judge of Beerbhoom, dated the 3rd September 1864.

Kurum Chand Koleeah and another, *Appellants,*

versus

Huree Mohun Ghose, *Respondent.*

Baboos Sreenath Doss and *Bhuggobutty Churn Ghose* for Appellant.

Baboos Banee Madhub Banerjee for Respondent.

Where an appeal is barred by law, an Appellate Court cannot interfere in any matter legitimately arising out of the case, unless there is want of jurisdiction.

In this case the Judge has set aside a sale, on the ground of a material irregularity and of substantial injury arising thereby to the debtor.

After hearing a good deal of argument in the case, our doubt is whether we can interfere at all in appeal.

Section 257 of Act VIII says that, if an objection to a sale be allowed, "the order made to set aside the sale shall be final:" and a Full Bench has ruled that there is no appeal from orders passed under this Section.

Hay's Reports, 19th February 1863.

It is urged, however, that though the order as to the reversal of the mere sale cannot be questioned, the orders of the Lower Court as to costs and other matters may be open to revision, as being beside the matter of the sale.

We own that we are unable to see, after consideration, how, if a substantial order or judgment be final, an Appellate Court can interfere in any matter arising out of, or connected with, such order, if it be in the natural and ordinary course.

It may be admitted, on the other hand, that the Judge's order seems to require amendment in one or two little points, and that the decree-holder, appellant before us, ought not to be saddled with the costs of the purchaser, who himself objected to the reversal of the sale. There is also room for some more clear and definite order as to the percentage on the sale, which is claimable by Government. The purchase-money will be refunded to the purchaser by the Judge's order, as the sale has been reversed, but the percentage due to Government must still be retained for the expenses of the sale, and it should be specified who is to pay it.

The remedy for these errors or defects is it seems to us, a review of judgment.

The analogy of the cases quoted for an appeal, Hay's Reports, page 188, 26th February 1863, and 9th of September 1864, page 97, Weekly Reporter, seems to us not to apply, or not to be favorable to the appellant.

Holding, then, the broad principle that, where an appeal is barred by law and precedent, an Appellate Court cannot interfere in any matter legitimately arising out of the case, unless there is some ground of entire want of jurisdiction, which is not pleaded.

We dismiss this appeal with costs.

The 3rd April 1865.

Present:

The Hon'ble W. S. Seton-Karr, *Judge.*

Stamp-Duty—Valuation of share of land.

Special Appeal from a decision passed by the Judge of Tirhoot, dated the 16th December 1864, *reversing a decision passed by the Deputy Collector of that District, dated the 8th June* 1864.

Ram Buksh Thakoor and others (Plaintiffs), *Appellants,*

versus

Ajoodhya Lal and others (Defendants), *Respondents.*

Baboo Dwarkanath Mookerjee for Appellants.

None for Respondents.

In valuing a suit relating to a share of land, the rental of the share is to be the criterion of the stamp.

Deputy Registrar.—THIS is an appeal against an order of a Civil Court under Section 9 Act VI of 1862.

The plaintiff, appellant, a shareholder in a joint estate, applied for and obtained, notwithstanding the objection of the defendant, respondent, the Collector's sanction to the measurement of certain lands in the estate.

The Judge reversed the order of the Collector, on the ground that "no one shareholder has the sole property in any one foot of land, and when the other shareholders object, is not entitled to measure under Section 9 Act VI of 1862."

The appeal will lie to this Court according to Section 10 of the said Act; but the appellant has filed his petition of appeal on a stamp of the value of *one* rupee. A stamp of this value is only used in cases valued at a sum less than rupees 16; and the most ordinary petition in this Court is engrossed on a stamp of the value of *two* rupees.

There are no means of ascerta precise value of this appeal, as the does not contain the usual stateme value; but judging from the shar ed, *viz.*, 13 annas 16 gundas 3 co krants of a mouzah, the appeal it seems to me, be valued so lc pees 16.

I beg the orders of the Cou whether the petition of appeal ma ceived without a statement of th of the appeal, and whether it any case, be received on a stamp of value as one rupee.

I would simply add that, unless t of the appeal be stated, it will not b ble to prepare a schedule of costs decree in this Court.

ORDER.—It is pretty clear that th will be about the value of the thing in Let the stamp be calculated on the rental of the land. Thus the lan stated to be about 13 annas of a r the rental of this share would be th rion of the stamp. The vakeels mu nish a statement accordingly.

The 5th April 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Will (Questions arising out of, not matter for summary investigation).

Case No. 27 of 1865.

Miscellaneous Appeal from an order passed by the Judge of the 24-Pergunnahs, dated the 12th December 1864.

Ishen Chunder Banerjee, *Appellant,*

versus

Dwarkanath Nundee and another, *Respondents.*

Baboos Onoocool Chunder Mookerjee, Unnoda Pershad Banerjee, Banee Madhub Banerjee, Dwarkanath Mitter, and *Luckee Churn Bose* for Appellant.

Baboo Sreenath Loss, Mohendro Lal Shome, and *Greeja Sunker Mojoomdar* for Respondents.

The power of an executor (who has himself refused to act) to appoint a substitute as provided for in the will, and all such questions arising out of the will, are not matters for adjudication in a summary investigation on an application for a certificate of administration.

APPLICATION has been made for a certificate of administration under the provisions of Act XXVII of 1860, by Eshan Chunder Banerjee, to the property left by Chedam Nundee. It appears that, so far back as 1264, a will was executed by Chedam Nundee and registered. Under this will, after providing for the payment of a small money allowance to his daughter-in-law, he devised the whole of his property to the support of the idol *Radhanath*, and appointed the petitioner to be the shewait; to carry out the purposes of his will, he appointed Ram Sagur Koond, Kenaram Bose, and Bissen Doss Ruhshy to be executors. The testator lived till 1271, when the shewait applied for a certificate under the will which he produced. The heirs-at-law disputed the genuineness of the will and claimed the certificate. The Judge, after taking evidence as to the execution of the will, and expressing a doubt as to the credibility of the evidence, adds that it was unnecessary to consider whether the will were valid or not. As the executors named in the will decline to act, the heirs-at-law are entitled to a certificate, and the present applicant must be referred to a regular suit. We think that, if the will is genuine, the unwillingness of the executors to act cannot be allowed to defeat the intention of the testator, and interfere with the objects of the will. It was necessary that a distinct finding as regards the validity of the will should have been come to. The petitioner, as shewait of the idol, was beneficially interested in the property, and he pressed the Court for a finding on this point. As the Judge has declined to come to any distinct decision on the genuineness of this document, we must do so if the evidence before us is sufficient to enable us to form an opinion. Looking at the will, we see from the registration that it has been in existence since 1264. We find that one of the executors proves its execution. The writer proves that he drew up the will, and a third witness proves execution. Much has been attempted to be made of certain discrepancies in this oral evidence; but it appears clear to us that the witnesses Nos. 2 and 3, *viz.*, the writer and attesting witness, do not contradict each other; the former is speaking of the drawing up of the will, and the latter of its execution, and we have no reason to believe that either is telling what is not strictly true; though their mode of telling it, or the mode in which their evidence has been recorded, has caused some apparent confusion, which the Judge, by a few questions, might have easily cleared up. We think, then, from the summary investigation we now are able to make, that the will must be considered valid.

There is a provision in the will by which the executor Ram Sagur is permitted to appoint a substitute in his place to carry out the purpose of the will. This provision appears to have been introduced under the supposition that Ram Sagur would be the surviving executor. Kenaram, one of the executors, is dead. Biprodass refuses to administer. Ram Sagur also refused to act, alleging sickness and other causes. He subsequently prayed that a certificate might be given to the petitioner, whom he nominated to carry out the purposes of the will in his stead. It is contended that, as he at first refused to act, he could not afterwards

assume the position of executor under the will, and appoint a substitute. But we think these, and all such questions arising out of the will, are too intricate to be investigated in a summary investigation like the present; that, considering the will to be genuine, we should give effect to it as far as possible, leaving the heirs-at-law to bring an action to set it aside; and under this view of the case, we reverse the order of the Judge, and direct that a certificate be given to the appellant, who will get his costs.

The 5th April 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Execution of decree—Sale proceeds (to whom to be first paid).

Case No. 503 of 1863.

Miscellaneous Appeal from an order passed by the Judge of Beerbhoom, dated the 28th September 1863.

Kartic Chunder Singh (Decree-holder), *Appellant,*

versus

Gogaram (Decree-holder) and Kisto Dhun Sheet (Judgment-debtor), *Respondents.*

Baboos Ashootosh Dhur and *Roopnath Banerjee* for Appellant.

None for Respondents.

The decree-holder by whom the property is first attached, and not the decree-holder at whose instance the sale takes place, is the party entitled to be first paid under Section 270 Act VIII of 1859.

SECTION 270 Act VIII of 1859 provides that, whenever property is sold in execution of a decree, the person, on whose application such property was attached, shall be entitled to be first paid out of the proceeds thereof, &c.

The petitioner attached the property on 2nd Chyet 1269. The other decree-holder, Gogaram, attached it on 5th Assar 1270, and, from the Judge's proceeding, it appears that the sale was made on the application of Gogaram, and he held that Gogaram was consequently entitled to be first paid out of the proceeds.

The Judge has looked to the sale and not to the attachment. It is not the party at whose instance the sale takes place, but the party by whom the property is first attached and thus, as it were, secured from alienation by the debtor, who is entitled to be paid first. We reverse the order of the Judge with costs.

The 5th April 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Appeal—Intervenor.

Case No. 682 of 1864.

Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of Bhaugulpore, dated the 18th August 1864.

Roghoonath Narain Sing and another, (Objectors), *Appellants,*

versus

Ram Churn Sahoo and others (Decree-holders) and Roop Narain Sing (Judgment-debtor), *Respondents.*

Baboo Roopnath Banerjee for Appellants.

Baboos Unnoda Pershad Banerjee and *Anund Gopaul Paleet* for Respondents.

No appeal lies to an intervenor whose objection has been disallowed by the Lower Court.

THIS is an appeal on the part of an intervenor, whose objection has been thrown out by the Lower Court. As the law allows of no appeal in such cases, we reject the application with costs.

The 5th April 1865.

Present :

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Joint decree (Execution of).

Case No. 664 of 1864.

Miscellaneous Appeal from an order passed by the Judge of Mymensingh, dated the 31st August 1864, *affirming an order passed by the Principal Sudder Ameen of that District, dated the 13th May* 1864

Krishto Kishore Chuckerbutty (one of the Judgment-debtors), *Appellant,*

versus

Ram Lochun Burdhun (Purchaser of Decree), and the rest of the Judgment-debtors, *Respondents.*

Baboo Anund Chunder Ghossal for Appellant.

Baboo Romssh Chunder Mitter for Respondents.

A joint-decree can be executed against any of the debtors whom the decree-holder may select.

THE Judge's ruling is quite legal and correct. The joint-decree can be executed against any one of the debtors whom the decree-holder may select. That the Principal Sudder Ameen, on a previous occasion, made a different arrangement from that now sanctioned by the Judge, makes no difference, and will not deprive the creditor of the choice and rights given him by law.

We dismiss this appeal with costs.

The 5th April 1865.

Present :

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Mahomedan Law—Wusseeutnamah—Will.

Case No. 25 of 1865.

Miscellaneous Appeal from an order passed by the Judge of East Burdwan, dated the 15th August 1864.

Sheik Jumeenooddeen Ahmed, *Appellant,*

versus

Meer Hossein Ali and another, *Respondents.*

Baboo Khetternath Bose for Appellant.

Mr. R. E. Twidale for Respondents.

A Wusseeutnamah or Will, diverting all the property from the next heirs, is illegal under Mahomedan Law.

THE Judge has treated this case at considerable length, and has given full and sufficient reasons for discrediting the wusseeutnamah, and for refusing the certificate claimed under the same. Except the existence of the title deeds in the hands of the appellant,—a fact quite explained away by the evidence of Zobeedunissa—the appellant has not the shadow of a claim, and there is no doubt that a wusseeutnamah, such as the one put forward, which is a will to all intents and purposes, diverting, as it does, all the property from the next heirs, would be illegal under Mahomedan Law, even if we could treat it as a genuine document, which is not possible.

In this view we dismiss the appeal with costs.

The 10th April 1865.

Present :

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Appeal (from order refusing to appoint manager under Section 243 Act VIII of 1859).

Case No. 92 of 1865.

Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of Behar, dated the 18th February 1865.

Baboo Bisram Singh *alias* Bishen Singh (Judgment-debtor), *Appellant,*

versus

Maharanee Inderjeet Koonwur (Decree-holder), *Respondent.*

Mr. R. E. Twidale for Appellant.

Mr. R. T. Allan and *Moonshee Ameer Ali,* for Respondent.

An appeal lies from an order refusing the request of a judgment-debtor for the appointment of a manager under Section 243 Act VIII of 1859.

IN execution of a decree, the Principal Sudder Ameen refused to accede to the

request of the judgment-debtor to appoint a manager under Section 243 of Act VIII of 1859; and we think that, under the circumstances, his order is quite right, for the judgment-debtor has tried by every means in his power to defeat his creditor, and prevent her from realizing the amount due. We confirm the order.

It was objected by the respondent that no appeal was admissible in such a case as this; but, as between parties to the suit, we think the words of Section 11 Act XXIII of 1861 are quite large enough to admit of an appeal.

We reject this appeal with costs.

The 10th April 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Appeal—Interlocutory Order—Purchaser at sale in execution of decree.

Case No. 32 of 1865

Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of Bhaugulpore, dated the 6th December 1864.

Bhoondur Mull (Auction-purchaser), *Appellant,*

versus

Gunga Pershad (Decree-holder), *Respondent.*

Mr. J. Baptist and *Moonshee Ameer Ali* for Appellant.

Mr. C. Gregory and *Baboo Unnoda Pershad Banerjee* for Respondent.

No appeal lies from an interlocutory order obtained by a purchaser at a sale in execution of a decree, who was not a party to the original suit.

In this case, on the parties alluded to appearing to show cause as required, it was objected by the opposite party that no appeal really lay to the Court: We find this to be the case. Bhoondur Mull was not a party to the original suit, and under the circumstances of the property which he had bought being again put up to sale for another lien upon it, he did the wisest thing he could do, which was to deposit the sum of 15,000 rupees, and so to save the property which he had previously bought for himself.

The interlocutory order obtained by the purchaser Bhoondur Mull, cannot be looked on as one given under the general powers of the Court, irrespective of the question whether there was an appeal or not, nor can it confer an appeal when the law itself has given none to the appellant.

We dismiss the appeal with costs.

The 10th April 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Mesne profits (Definition of)—Value of trees cut down.

Case No. 704 of 1864.

Miscellaneous Appeal from an order passed by the Judge of Tirhoot, dated the 9th September 1864.

Buneead Singh and others (Decree-holders), *Appellants,*

versus

Sudaseeb Dutt and others (Judgment-debtors), *Respondents.*

Baboo Kishen Succa Mookerjee for Appellants.
Baboo Kalee Kishen Sein for Respondents.

The value of trees cut down and appropriated by a judgment-debtor against whom a decree with mesne profits has been given, may be included in the mesne profits for which the judgment-debtor, whilst in wrongful possession, is liable.

The question is whether the value of trees cut down and appropriated by the defendant against whom a decree with mesne profits has been given, can be included in the mesne profits. It is contended that rents are alone legitimate mesne profits which can be recovered from a defendant. Rents are only one item of mesne profits. Profits from orchards, fisheries, profits from the sale of jungle cut for firewood, and other items come into and form the aggregate of mesne profits, for which a party in wrongful possession is liable; and if such party cut down the timber in an estate and derive a profit by the sale of it, we see no reason why the amount so realized should not be recovered as part of the profits collected by such defendant during his possession. The decree-holder might, perhaps, have brought an action for damages to the property, if the circumstances of the case warrant such a course of proceeding; but if he prefer taking the other course and merely claim the value of the timber as an asset of the estate, we see no objection to its being entered as an item in

the account of profits. The Lower Court will have to determine whether the petitioner's allegation is true and the case is remanded for that purpose.

The 13th April 1865.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Pleader (Absence of)—Decree (Definition of, under Section 333 of Act VIII of 1859.

Case No. 324 of 1865.

Special Appeal from a decision of the Judge of Patna, dated the 17th November 1864, modifying a decision of the Principal Sudder Ameen, dated the 14th April 1863.

Hossanee Begum (Defendant), *Appellant,*

versus

Dumree Mahtoon (Plaintiff), *Respondent.*

Mr. C. Gregory for Appellant.

None for Respondent.

A pleader is bound to move for an order as soon as return is made.

The word "*decree*" in Section 333 of Act VIII of 1859 must be read to include the judgment.

MR. GREGORY has asked for a review, as the order was passed in the absence of the pleader on the 17th of March. He urges that the pleader could not tell that a return made on the third day (27th February) should be taken up on the 17th of March.

Without going into this point further, we *now* order that, hereafter, a pleader before this Bench shall be bound to move for an order immediately after the period for the return has expired; and, if he does not do so, the case shall be liable to be taken up in his absence.

On general principle we think that, as a party cannot appeal merely from the decree without copy of the judgment which contains the reasons, we must conclude that "decree" in Section 333 must be read to include the judgment. Time, therefore, is allowed for obtaining copy of that latter document also.

We have reason to believe that this is in accordance with the practice of the Court on both sides.

The 19th April 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Jurisdiction (of Civil Court)—Suit to set aside partition under Regulation XIX of 1864.

Case No. 647 of 1864.

Miscellaneous Appeal from an order passed by the Judge of Burdwan, dated the 19th August 1864.

Radha Bullubh Singh, *Appellant,*

versus

Maharaja Dheeraj Mahatab Chand Bahadoor, *Respondent.*

Baboo Prosunno Coomar Sein for Appellant.

Baboos Juggadanund Mookerjee and *Chunder Madhub Ghose* for Respondent.

No suit lies to the Civil Court to set aside a partition of property made by the Collector and confirmed by the Board of Revenue under Regulation XIX of 1814.

WE think that the order of the Lower Court is correct. The Civil Court directed a partition of the property to be made by the Collector, who proceeded under the provisions of Regulation XIX of 1814. Section 19 of that law points out how the Collector is to proceed in making the partition, and Clause 3 provides for the hearing of objections which any party may have to make against that partition, and Clause 1 Section 20 declares that the determination of the Board of Revenue on the paper of partition is final. If, therefore, the appellant had any objection to the Collector's proceeding as not satisfying the requisitions of the decree passed by the Civil Court, he should have pointed out the error by petition to the Board of Revenue. Now, that the Board has confirmed the partition, he cannot come to the Civil Court on the ground that the decree has not been fully carried out, and ask its interference to set aside that partition. The appeal is dismissed with costs.

The 20th April 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Joint decree—Liability of particular defendants—Division of decree.

Case No. 567 of 1864.

Miscellaneous Appeal from an order passed by Moulvie Syud Emdad Ali Khan, Principal Sudder Ameen of Tirhoot, dated the 20th August 1864.

Bulwunt Singh (Decree-holder), *Appellant*,

versus

Sheo Sahoye Singh and others (Judgment-debtors), *Respondents*.

Baboo Chunder Madhub Ghose for Appellant.

Baboo Onoocool Chunder Mookerjee for Respondents.

Though a decroe-holder has a right to put joint and common decrees in force against one or all of the defendants in the order he thinks fit, the claim to be enforced must be limited to the particular lands or properties with which particular defendants are clearly shown to have been connected.

The application for dividing the amount of a joint decree should be made, and the order for such division obtained, at the time of the decree, but not afterwards.

THE Principal Sudder Ameen has given very full directions in this case, which relate to mesne profits due to the appellant, successful plaintiff, in an action of ejectment. The Court has given further orders in regard to certain additional enquiries, which are to be made by a second Ameen on the spot, and it has also decreed certain items against the respondents, and has ordered the same to be realized at once.

We have heard the pleaders for both sides at some length; and without interfering with the directions given for the further ascertainment of certain facts and points in dispute, we are still able to lay down the principle on which the successful plaintiff, appellant before us, shall be entitled to carry out his decree.

The decree, we observe, was granted in a suit for the recovery of certain lands, and for the reversal of an award under Act IV of 1840, as well as of some mokurruree and ticca pottahs. The decree ends by saying that the plaintiff shall recover mesne profits from the defendants ("*muddalchan se pawe*") without any further specification or detail. The appellant urges on this, that he is entitled to carry out his whole decree to the full against any of the defendants who are numbered 1 to 4 and 5 to 8, jointly or severally as he may think fit; that this is the principle universally acted on in all such cases, and is one respected and admitted by the Court. We fully admit the right of decree-holders to put joint and common decrees in force against one or all of the defendants in the order they think fit; but the claim to be enforced must be limited to the particular lands or properties with which particular defendants are clearly shown to have been connected. If it can be proved incontestibly that, out of a number of defendants, any one man has been in possession only of particular lands, or distinct mouzahs, or distinct leases, temporary or other, the liability to satisfy the joint and common decree will, in all equity, extend no further than such particular lands, mouzahs, or leases. And for such lands, the decree-holder may take out his execution against the lessee or the lessor, unless it be otherwise specified in the decree, which we have seen is not so in this instance.

Now, to apply this principle to the case before us, we find that Mr. Smith, defendant No. 5, had a ticca lease for mouzah Hursingpore, the rental of which is estimated at rupees 996-4-6, and a mokurruree in the same village the rent of which is estimated at rupees 672. These leases he had obtained from defendants 1 to 4, and it is urged for him that he obtained them in good faith, and was no wrong-doer. In the same way, Gunesh Dutt, defendant No. 8, had a lease in mouzah Allumpore, also from the same defendants, Nos. 1 to 4, of which rent was rupees 1,071-2-6. The Lower Court has apportioned the payment of these items, on the evidence before it, between Nos. 5, and 1 to 4 with regard to the two first, and between No. 8 and Nos. 1 to 4, with regard to the third. We are of opinion that any grounds for such division should have been urged, and any order should have been obtained, at the time of the decree. If defendants are content to allow a joint-decree to be recorded against them at the time of delivering judgment, we cannot help it, and the matter cannot be re-opened at a later date. The liability of a joint-decree is a doctrine thoroughly understood and generally accepted; and even should there ensue any hardship from acting thereon in the present case, it is better that we should tell the respondents that they must accept such hardship as the consequence of their own laches, than that we, on the score of some apparent fairness or equity, should introduce a new principle into the interpretation of decrees.

Our order is, therefore, that, with regard to particular properties with which either

No. 5 or No. 8 is connected, the decree may be executed against them jointly or severally, as the appellant may think fit, together with the proprietor defendants Nos. 1 to 4. The order of the Principal Sudder Ameen is modified accordingly. Costs to the appellant. As regards Nos. 6 and 7, we observe that the Lower Court has ordered a further enquiry as to the fact of their possession of certain properties, and if found to be in possession, the principle laid down above will equally apply to their cases.

The 24th April 1865.

Present :

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Decree for penal damages (construction and enforcement of).

Case No. 64 of 1865.

Miscellaneous Appeal from an order passed by the Judge of Patna, dated the 25th November 1864, *reversing an order passed by the Principal Sudder Ameen of that District, dated the 16th July* 1864.

Deb Narain, *Appellant,*

versus

Gour Pershad Sahoo, *Respondent.*

Baboo Debendro Narain Bose for Appellant.

Baboo Tarucknath Sein for Respondent.

A decree in the nature of penal damages should be construed strictly and literally, and enforced only against the persons at whose application and instance the act complained of took place.

AFTER hearing both parties, we are of opinion that the order of the Judges is legally wrong. The decree sought to be executed is in the nature of penal damages, and therefore it should be construed strictly. Now, the decree says that the respondent shall recover from the persons *at whose application* the crops were attached. These persons, the Judge finds, and it is not denied by either party, were, as by their petition for attachment, two in number and not three. That the mooktearnamah, empowering the attorney to make the application, is said by the Judge to have had the assent of three parties, is not the point to be looked at. The power of attorney may have been signed by three parties; but if the acts done in consequence were done for two and not for three persons, we cannot import the name of the third party into a petition or application in which it does not appear.

The appearance of the third party to defend the Civil suit against the attachment does not alter the matter. For he may have had no option but to defend the case when brought into Court; and if the suit turned out unfavorably for all the defendants, still any one of them is not debarred from taking advantage of any legal flaw or omission which the decree may leave open to him.

Holding, then, the principle that such a decree must be construed strictly and literally, and that it can be enforced only against the persons at whose application and instance the act complained of took place, we admit the appeal, and reverse the Judge's decision with costs.

The 24th April 1865.

Present :

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Execution out of jurisdiction of Court passing decree.

Case No. 71 of 1865.

Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of Nuddea, dated the 24th January 1865.

Bawun Doss Mookerjee (Judgment-debtor), *Appellent,*

versus

Mr. C. S. Hogg, Receiver of the High Court, (Decree-holder), *Respondent.*

Baboo Mohinee Mohun Roy for Appellant.

Baboo Dwarkanath Mitter for Respondent.

Procedure where attachment is sought of property situate out of the jurisdiction of the Court by which the decree was passed.

THE Receiver, on the part of Tarinee *alias* Syamonee Dabee applied to the Principal Sudder Ameen of zillah Nuddea, on 4th January 1865, in execution of the decree held by her against Bawun Dass Mookerjee for the attachment of certain immoveable property situated in Dacca, Bindabun, and other Districts, in which the Principal Sudder Ameen had no jurisdiction, on the ground that the judgment-debtor was about to alienate the property. Evidence was called for. The Receiver on the 5th filed a list of the property, and on the same day the judgment-debtor filed objections, and on the 24th idem these objections were over-ruled, and an order issued by the Principal Sudder Ameen for attachment of these properties, and from this order an appeal is preferred.

It appears to us that the whole of these proceedings are irregular. The petition on the part of the Receiver was of the nature of an application for execution. It was altogether irregular in form as prescribed by Section 212 of Act VIII of 1859; and as the property sought to be attached was situated in other Districts, the Principal Sudder Ameen, instead of complying with the request of the petitioner, should have proceeded in the manner prescribed by Section 285 of the Code, leaving the petitioner to apply to the Court within whose jurisdiction the property was situated for execution in due form.

The order of attachment issued by the Principal Sudder Ameen is altogether illegal, and must be set aside. The petitioner can file a petition in due form for execution, and apply to the Principal Sudder Ameen a fresh to issue a certificate, and transmit it with a copy of the decree to any Court indicated by the petitioner. We reverse the order of the Principal Sudder Ameen with costs.

The 24th April 1865.

Present:

The Hon'ble G. Loch and W. S. Seton-Karr, *Judges.*

Appeal (by Objector).

Case No. 176 of 1865.

Miscellaneous Appeal from an order passed by Mr. W. DaCosta, Officiating Principal Sudder Ameen of Purneah, dated the 8th March 1865.

Luchmeeput Singh and another (Objectors), *Appellants,*

versus

Lekraj Roy (Decree-holder), and Rajah Rajendar Narain Roy (Judgment-debtor), *Respondents.*

Mr. R. T. Allan and *Baboo Banee Madhub Banerjee* for Appellants.

None for Respondents.

An appeal does not lie to an objector, not one of the parties, *i. e.*, neither the decree-holder nor the judgment-debtor.

Deputy Registrar.—THIS is an appeal from an order of the Principal Sudder Ameen of Purneah, dated the 6th of March 1865, rejecting, on the ground of a prior attachment in a pending suit, the application of a third party, objector, to stay the sale of some Promissory notes in execution of a decree.

The order of the Principal Sudder Ameen is based on Section 89 Act VIII of 1859.

Section 11 Act XXIII of 1861 provides for an appeal from orders in execution on questions arising *between the parties* to the suit.

This appeal is not from such an order but from an order on the application of a third party, objector, not connected with the suit.

There is, therefore, reason to doubt whether his appeal will lie; and I accordingly beg to refer the point for the orders of the Court.

Order.—This is clearly an appeal from an objector; not one of the parties to the suit, *i. e.*, neither the decree-holder nor the judgment-debtor, and, therefore, an appeal from such objector is inadmissible. His only remedy is to go to the Civil Court. This application is rejected.

The 2nd January 1865.

Present:

The Hon'ble F. B. Kemp and F. A. Glover,
Puisne Judges.

Substitution of Transportation for imprisonment—Robbery—Voluntarily causing Hurt.

Queen *versus* Mootkee Kora.

Committed by the Joint Magistrate, and tried by the Sessions Judge of Midnapore, on a charge of Highway Robbery, &c.

To bring Section 59 of the Penal Code into operation, the punishment awarded on one offence alone must be 7 years' imprisonment, and cannot be made up by adding two sentences together, and then commuting the amalgamated period to transportation.

The two offences of robbery and of voluntarily causing hurt, when combined, are punishable under Section 394 alone, and not under Sections 392 and 394.

Mr. Justice Glover.—THE prisoner in this case has been convicted of Highway Robbery under Section 392 of the Penal Code, and of voluntarily causing hurt, &c., under Section 394, and has been sentenced to 3 years' transportation with a fine of rupees 50 for the first, and to 7 years' transportation for the second offence. Before considering the evidence, I remark that the first sentence of 3 years' transportation passed under Sections 392 and 59 of the Penal Code, is illegal; under the latter Section a sentence of transportation cannot be less than 7 years, and it has been frequently ruled by this Court that to bring Section 59 into operation, the punishment awarded on one offence alone must be 7 years' imprisonment, and cannot be made up by adding two sentences together, and then commuting the amalgamated period to transportation.

I observe also that Section 394, in itself, provides for the offence of which the prisoner has been found guilty. That Section refers to "causing hurt whilst committing or attempting to commit robbery," and the amount of punishment that can be awarded, *viz.*, transportation for life, shows that the Section includes the robbery as well as the hurt, and that when the two offences are combined, a fresh conviction under Section 392 is unnecessary.

For the rest I have gone very carefully and more than once over the whole of the evidence recorded by the Sessions Judge, and although there are some points—Haradhun's state when he left the grogshop, and when found the next morning by Seedeshur Moito (a witness not forthcoming) for example—which could have been more satisfactorily cleared up, there is, I consider, sufficient proof of the prisoner's guilt. It is clearly established that he induced the prosecutor to go with him to a distant village for the purpose of buying skins, and that the two started in company, the prisoner carrying an axe and a lathee. The prisoner himself admits that he went with Haradhun, although he asserts that he was hired to carry the skins when bought. The prosecutor's statement regarding the actual attack is, no doubt, unsupported by direct evidence; the assault having taken place by night and in a lonely place, surrounded by jungle; but the situation in which he was found next morning, leaves no room for doubt that he was cruelly wounded with a blunt axe or some similar weapon, besides having his jaw broken, and one of his teeth knocked out. The Medical officer was decided in his opinion that the former injuries could not have been self-inflicted, nor the result of a fall; and, as I before observed, when the prisoner and Haradhun started on their journey, the former carried an axe and a lathee. Similar weapons were found in his house after his arrest, and were proved, by evidence, to be his property.

Directly Haradhun was found, he named, though in an indirect manner, caused by the severe nature of the wounds, the prisoner as the man who had attacked him, and this statement he has repeated ever since without variation. There was no ill-feeling between the parties (on the contrary Haradhun appears to have kept his cattle in the prisoner's house), and no conceivable reason for his accusing the latter falsely.

The defence is that the prosecutor got drunk, fell down, and so injured himself. In support of it one witness deposes that he saw Haradhun lying on the ground the morning after the occurrence, and that the latter told him that he had so fallen; but this witness admits that Haradhun spoke

very unintelligibly, was nearly senseless; and that he (witness) could not understand all he said. There is thus much doubtless of descrepancy in the prosecutor's evidence that Haradhun first said that he had been robbed of rupees 3-8 only, and that his statements before the Magistrate and Sessions Judge do not tally, *quoad* his having been drinking before the prisoner attacked him; but the discrepancies is after all more nominal than real. Though Haradhun first mentioned rupees 3-8 as the sum he had been robbed of, he almost immediately corrected himself and said it was rupees 10; and considering his state both at the time and afterwards when examined by the Magistrate, the only wonder is that he was able to give any connected account at all of what had befallen him either on this point or on any other. That he had been drinking he admitted, though he denied being drunk. But the only effect this admission could have, would be on Haradhun's power to state correctly what had happened, and to identify his assailant; it could have nothing to do with the prisoner's line of defence, *viz.*, that Haradhun had injured himself by falling on a stone as the medical evidence clearly establishes the fact that the injuries on the head could not have been so caused. Taking all these circumstances together, I see no reason to disbelieve Haradhun's statement, and so far would reject the appeal.

With regard to the punishment, I would not interfere with the aggregate amount imposed by the Sessions Judge, although I would convict the prisoner under Section 394 only.

As the sentence I propose would be 10 years' transportation, the punishment will not have beeen enhanced, and Section 419 of the Criminal Procedure Code will not apply.

The papers must go before my colleague, Mr. Justice Kemp.

Mr. Justice Kemp.—I concur.

The 4th January 1865.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Puisne Judges.*

Deputy Magistrate (Powers of)—Criminal Trespass—Unlawful Assembly—Mischief—Disputes concerning land.

Queen *versus* Ootum Mal and others.

Committed by the Deputy Magistrate, and referred by the Officiating Joint Magistrate of Rajshahye on a charge of Unlawful Assembly, &c.

A Deputy Magistrate should adjudicate on charges of criminal trespass, unlawful assembly, and mischief, instead of referring the case under Section 318 of the Criminal Procedure Code, to the Magistrate.

A Deputy Magistrate vested with the powers of a Subordinate Magistrate of the 2nd class, cannot institute proceedings under the said Section.

THE defendants in the case out of which this reference arises were charged before the Deputy Magistrate under Sections 143, 426, and 447 of the Penal Code. That Officer (acting apparently under a general order of a former Magistrate of the district) declined passing orders on the question of the illegal assembly, &c., thinking that the defendants were acting under a *bonâ fide* claim of right in the shape of a pottah from the proprietor of the land; but as he thought a breach of the peace imminent, he sent the case, under Section 318 of the Code of Criminal Procedure, to the Magistrate.

The Magistrate has referred the case here, on the ground that the Deputy Magistrate was bound to adjudicate on the charges of criminal trespass, illegal assembly, and mischief; he also considered that the Court of first instance should have itself decided the point of possession, and not have referred it to him.

We have had, in connexion with the Deputy Magistrate's order, our attention directed to the Full Bench ruling of this Court, dated 11th June 1864, No. 460, wherein it is laid down that a criminal charge, once instituted and disposed of, should not be revived. But setting aside the fact that this ruling refers more properly to cases where the plaintiff has allowed his case, to be dismissed on default, the present case, we observe, was not disposed of at all. The Deputy Magistrate passed no orders on the several charges made, but referred the matter with a report to the Magistrate to be disposed of under Section 318 of the Procedure Code.

In this, we think, he was wrong. He was bound to decide the case, as it was brought before him, under Sections 143, 426, and 447 of the Penal Code, the more especially as there was no question as to the actual possession at the time the alleged illegal entry was made. It was admitted by the defendants themselves that the other side had sowed Indigo on the disputed lands, and were in possession, although they claimed a superior right.

We see no reason, therefore, why the charges brought by the plaintiff should not

be enquired into by the Deputy Magistrate.

With regard to the Joint Magistrate's second point of reference, we observe, that the Deputy Magistrate, Baboo Juggeshur Mookerjee, was vested with the powers of a Subordinate Magistrate of the 2nd class only, and could not therefore institute proceedings under Section 318 of the Procedure Code; such power being confined to the Magistrate of the district, or to an Officer exercising the full powers of a Magistrate.

The 5th January 1865.

Present:

The Hon'ble F. A. Glover, *Puisne Judge.*

Appeal—Evidence (Sufficiency of).

Queen *versus* Muddun Sirdar *alias* Gurreeboollah and 10 others.

Committed by the Magistrate and tried by the Sessions Judge of Dacca, on a charge of Dacoity, &c.

Objections to the sufficiency of evidence are not a ground of appeal. The deposition of a single credible witness is sufficient in law.

THE petition of appeal in this case is made up solely of objections to the sufficiency of the evidence. This was a question for the Jury, and they decided that it was sufficient for conviction. The deposition of a single credible witness is sufficient in law; and it was for the Jury to say whether the circumstances of the case, and the corroborative evidence tendered, were sufficient to make that one witness's statement credible.

No point of law arises in this case, and the appeal is therefore rejected.

The 5th January 1865.

Present:

The Hon'ble F. A. Glover, *Judge.*

Kidnapping.

Queen *versus* Bhungee Ahur.

Committed by the Joint Magistrate, and tried by the Sessions Judge of Sarun, on a charge of Kidnapping from lawful guardianship.

The consent of a kidnapped person is immaterial; and it is not necessary for a conviction under Section 361 Penal Code that the taking or enticing should be shewn to have been by means of force or fraud.

As the prisoner admits, and has all along admitted, that he took the boy with him, the only point for consideration is the lad's age.

The consent of a kidnapped person is immaterial; and it is not necessary for a conviction under Section 361 of the Penal Code, that the taking or enticing should be shown to have been by means of force or fraud.

Now, the prisoner before the Sessions declared the boy to be 15 years old, and his two witnesses have deposed to his being about that age. But the prisoner himself admitted in his defence before the Magistrate that the lad's age was 12 years only, and his father and other witnesses for the prosecution clearly establish the fact that he was under 14. I see, therefore, no grounds for interference with the Sessions Judge's order, and reject the appeal.

The 5th January 1865.

Present:

The Hon'ble F. A. Glover, *Judge.*

Appeal—Enmity of prosecutor—Confession of prisoner (at instance of Police).

Queen *versus* Gopaul Doss.

Committed by the Deputy Magistrate, and tried by the Sessions Judge of Moorshedabad, on a charge of House-breaking by night in order to commit Theft, &c.

The pleas that the prosecutor is at feud with the prisoner, and the prisoner's confession, was given at the instance of the Police, are not grounds of appeal.

THE prisoner in this case confessed before the Deputy Magistrate, and his statement was received by the Sessions Judge as evidence under Section 366 of the Criminal Procedure Code.

The facts of the case were properly laid before the Jury, who found the prisoner guilty.

He pleads in appeal that the prosecutor is at feud with him, and that the confession was given at the instance of the Police.

Neither of these are points which the Court can take up in appeal. The Jury had both these allegations before them, and decided on the evidence against the prisoner.

The appeal is rejected.

The 10th January 1865.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Retaining counterfeit seals and forged documents, intending to use them fraudulently.

Queen *versus* Kisto Soonder Deb.

Committed by the Joint Magistrate and tried by the Sessions Judge of Rajshahye, on a charge of retaining counterfeit Seals and forged Documents intending fraudulently to use them as genuine.

Counterfeit Seals and forged documents were found in the prisoner's possession; and as he could give no satisfactory information as to how he became possessed of them, it was inferred that he kept them with the intention of using them fraudulently.

Mr. Justice Glover.—That a number of counterfeit Seals together with instruments for making them, and a forged Document purporting to be a Fysala of the Moonsiff of Nattore, were found in the prisoner's house, is unquestionable.

The prisoner himself admits the fact, but urges that they were placed there by his enemy, Ramdhun Chand.

The recorded evidence and especially that of the District Superintendent of Police, Mr. Jenkins, proves that the houses of the parties, though adjoining, are surrounded by separate court-yards, and further that the only access (other than the door which was padlocked) to the room in which the counterfeit Seals were found, was a small window covered with cobwebs, which had evidently not been disturbed for a very long period, and which, had the box been passed into the room by

the window, would have necessarily shown unmistakeable signs of the passage.

To the Magistrate the prisoner stated that the Fysala above mentioned had been left in his charge by one Bisheshur Bagchee, and that it was a genuine document. Before the Sessions he includes it in his general defence, asserting that it was placed in his house by his enemies along with the other articles found. As the finding of what is clearly proved by the evidence to be a forged document, purporting to be the decision of the Moonsiff of Nattore, in the prisoner's house, is admitted by the prisoner himself; and as he further admits that the counterfeit impression of various Seals belonging to different zemindars of the district, some of whom are still living, together with sundry tools for manufacturing the same, were found in his house in a room secured by a padlock; as it is moreover established by independent and reliable evidence that the only way in which the box containing these counterfeit Seals, &c., could have been introduced into the room in question, was by the door which was padlocked; it follows that the articles must be considered as found in the prisoner's possession. And as he can give no satisfactory information as to how he became possessed of them, it may be reasonably inferred that he kept them with an intention to use them fraudulently.

I see, therefore, no reason to interfere with the Sessions Judge's order convicting him alternately under Section 472 or Section 473, and sentencing him to seven years' transportation.

But, in accordance with many rulings of this Court, the sentence of three years' transportation passed on the prisoner on the 3rd count is illegal (*vide* Courts Judgment, dated 2nd January 1865, in *re* Mootka Kora, appellant,) and this sentence should be altered to one of three years' rigorous imprisonment.

On this point, the case must be laid before my colleague Mr. Justice Kemp.

Mr. Justice Kemp.—I concur on the point referred to me.

The 10th January 1865.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges*.

Witnesses (for defence)—Examination of.

Queen *versus* Bhoobun Isher Gossamee.

Committed by the Deputy Magistrate of Serajgunge, and tried by the Sessions Judge of Rajshahye, on a charge of Theft in a building, &c.

A prisoner on trial is entitled to have his witnesses examined.

Mr. Justice Glover.—It does not appear from the record of this case that the Sessions Judge either summoned or examined the prisoner's defence witnesses. The prisoner stated that his story could be proved by the evidence of certain persons whom he named, and he had a right to have them examined.

Bhoobun Isher was a Brahmin cook employed in a Kali Baree or Temple dedicated to Kali. He disappeared immediately after the theft, and was not arrested till more than two years afterwards at Kamroop in Assam, when sundry golden ornaments and precious stones were found in his possession. His account is that the theft was a "got up" affair on the part of one of the shareholders of the Temple, that this person sent for him three or four nights after the theft, and made over to him the articles of jewellery in question, telling him to make the best of his way with them to his own house, and to keep them till reclaimed.

The Sessions Judge discredits this story mainly on the ground that a portion of the jewellery was found broken. But if this be a good argument, the converse of it must apply equally to the Purjeah and pearl necklace which were found intact. Moreover it seems to me that, had the prisoner stolen the property, he would hardly have kept it by him in a recognizable shape for so long. But this by the way.

The Sessions Judge further remarks that, even if the prisoner's story were true so far, he would still be liable under Section 411 for dishonestly receiving and retaining. This may perhaps be so; but the limit of punishment under that Section is 3 years' imprisonment, whereas the prisoner has under Section 381 been sentenced to five.

In any case, he has an absolute right to demand that his witnesses may be examined, and I think that this case should be sent back with directions to record their evidence, and, after taking a fresh opinion from the assessors, to decide the case *de novo*.

The papers must go before my colleague, Mr. Justice Kemp.

Mr. Justice Kemp.—I think the prisoner is entitled to have his witnesses examined; and I, therefore, concur in sending the case back for that purpose.

The 16th January 1865.

Present:

The Hon'ble F. B. Kemp and F. A. Glover,

Puisne Judges.

Abduction.

Queen *versus* Komul Dass.

Committed by the Joint Magistrate, and tried by the Sessions Judge of Sylhet, on a charge of Abduction and Cheating.

A conviction of abduction quashed, no force or deceit having been practised on the person abducted.

THE prisoner has been convicted on two counts, first of abducting Rajin Dassee (Section 366), and second of cheating (Section 420 Indian Penal Code).

We have read the evidence in this case. There is sufficient to support the charge of cheating, but the offence of abduction is not made out. The girl was leaving with the witness No. 3, Goopee Thakoor. This witness took 4 Rupees from the prisoner, and permitted the girl to leave his house for the purpose of being married to the brother of the prisoner. The prisoner did not marry the girl to his brother, but passed her off as a Brahminee girl, and took Rupees 175 from the witness, Thakoordass Surma, No. 4. This witness being doubtful of the girl's caste, an attempt was made to solve his doubts by making the girl cook, and the witness Goopee Thakoor (a Brahmin) eat the food cooked by her. The girl seems to us to have entered fully into the plot, and no force or deceitful means were used to induce her to leave the house of Goopee Thakoor. We confirm the conviction and sentence on the second count of cheating, and quash the conviction on the count of abduction.

RULINGS OF THE HIGH COURT IN CRIMINAL CASES.

The 16th January 1865.

Present :

The Hon'ble G. Campbell and F. A. Glover, *Judges.*

Use of justifiable violence by Police in capturing a thief.

Queen *versus* Protab Chowkedar.

Committed by the Magistrate of Maldah, and tried by the Sessions Judge of Dinagepore, on a charge of Grievous Hurt.

The wounding of a thief by a chowkedar in order to his arrest, held under the circumstance to be justifiable.

Mr. Justice Campbell.—It seems to me that the judgment and sentence of the Judge are quite inconsistent. I gather from the judgment and the previous proceedings, that the prisoner in good faith took the complainant for a thief (whether he really was so or not, does not appear) whom he as a chowkedar was bound to capture. If there was any mistake regarding the fact of complainant's being a thief, it was a mistake of fact and not a mistake of law, and prisoner is entitled to the benefit of Section 76 and 79 of the Penal Code. Assuming then that prisoner, a chowkedar, in good faith believed the complainant to be a thief whom he was bound to capture, has he, as the Judge finds the fact, committed the offence charged? I think not. The Judge seems entirely to differ from the Magistrate, who thought that prisoner unnecessarily wounded the complainant. According to the Judge, complainant made a desperate resistance, and "at length, prisoner seeing no other means of securing the fugitive, for whose escape he, as a chowkedar, would have been held responsible, wounded him with a spear." The wounds were mere "punctured wounds," not dangerous. Under these circumstances it seems to me that the chowkedar, seeking to arrest a fugitive thief, and who sees no other means of capturing him, is fully justified in using so much violence as is necessary to effect this object. I, therefore, am of opinion that the prisoner in this case should be acquitted and released. It does not appear that the Judge explained to the Assessors the law in the above sense; if he had, they might have acquitted the prisoner. But in this case the Judge, and not the Assessors, is responsible for the finding of fact; and it is on the Judge's finding of fact that I would acquit. If a chowkedar, who finds it necessary to wound a desperate thief (as the only means of capturing him), is to be committed and punished, thieves who resist, as did the present complainant, will never be arrested.

Mr. Justice Glover.—The prisoner, who is a chowkedar, appears in this particular instance to have acted in a double capacity. The man Bhageerut Napit was found lurking in his house at night, and the prisoner naturally tried to arrest him. The circumstances, under which the man was ultimately captured, are fully detailed in the Sessions Judge's statement; and it appears to me that the prisoner, whether acting as a chowkedar or as a private person effecting an arrest of his own accord under circumstances which justified him in so doing, was fully protected by the law in using that amount of violence necessary to secure the person of the fugitive house-breaker.

The question here would be, whether the means employed to stop the fugitive were such as an ordinarily prudent man would make use of who had no intention of doing any serious injury.

Now it is admitted by the Judge, that the prisoner did not use his spear, until he saw no other means of securing the fugitive, for whose escape he, as a chowkedar, would have been held responsible, and the wounds inflicted do not appear to have been in any way dangerous. Taking all these circumstances into consideration, I think, with Mr. Justice Campbell, that the violence used by the prisoner was justifiable, and that the sentence of one year's rigorous imprisonment passed upon him should be reversed.

The 18th January 1865.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Plea of autrefois acquit—Abetment of false charge of murder (Proof of mala fides).

Queen *versus* Muthoorapershad Panday and others.

Committed by the Deputy Commissioner, and tried by the Judicial Commissioner of Chotá Nagpore, on a charge of Abetting the bringing of a charge of Murder, &c.

A former trial set aside on the ground of want of jurisdiction and illegality, is not a bar to a second trial.

The conviction of a Police Inspector for having abetted the bringing of a false charge of murder, quashed, because it was not distinctly shown that he preferred the charge *malâ fide*.

Mr. Justice Glover.—THIS case has been in one shape or other *sub judice* since the beginning of last year. The facts are shortly as follow. Ramsurun, a man employed by one Lalla Purushunt Sahai as priest and servant, disappeared from his master's house and service; and two men, Sajeebun Singh and Gujna Dhobee, were sent in by the Police as his murderers, prisoners Nos. 4 and 5 giving evidence that they saw them kill him. The original information was preferred to the Police on the 15th of August 1863 by the prisoner No. 8, Jilwah, who stated that he gave it at the instance of Mussamut Goonee, prisoner No. 6, Ramsurun's mistress.

The Police Inspector, prisoner No. 7, Muthoorapershad, made his appearance the next day, and commenced his enquiries. His reports were very numerous, and the result of them was that Lalla Purushunt Sahai, Sujeewun Singh, and Gujna Dhobee were charged with the murder of Ramsurun on the evidence of parties above mentioned, and of others who are likewise appellants in this case.

The charge was heard in the first instance by the Deputy Commissioner, who ordered further inquiry, pending which Ramsurun, the man alleged to have been murdered, unexpectedly made his appearance. His story was that he had applied for leave of absence from his master, Lalla Purushunt Sahai, and being refused, had gone off without permission to his house at Sasseram.

The tables were now turned, and the parties who had sworn to having seen the accused murder Ramsurun, together with the original informants at the Thanna, were in their turn put upon their defence as were also the Police Inspector and the prisoners Nos. 1, 2, and 3.

The Deputy Commissioner, I observe, at first refused to take action in the matter, and it was not until the Appellate Court ordered an enquiry that the case was allowed to proceed.

The result was that all the prisoners were convicted and sentenced to various terms of imprisonment, the longest being one year.

The Judicial Commissioner, to whom the sentence were referred for confirmation, enhanced the punishment inflicted on prisoners, Nos 1, 2, and 3, and confirmed that passed on prisoners Nos. 4, 5, 6, and 8. Prisoner No. 7, the Police Inspector, he released altogether.

The three first-named prisoners appealed to this Court, when the conviction was quashed (19th May 1864, Seton-Karr and E. Jackson, J. J.) as illegal, and the Deputy Commissioner was directed to commit all the accused to the Sessions. The High Court's judgment contains a very complete *resumé* of the whole case, and makes it unnecessary for me to enter into a lengthened statement now.

The commitment was made accordingly, and the Judicial Commissioner has now convicted all the prisoners, sentencing them to various terms of imprisonment; and from this sentence they have again appealed.

The Counsel for Muthoorapershad, the Police Inspector, takes an *in limine* objection as regards his client, urging that, as he was acquitted by the Judicial Commissioner at the first trial, he could not be tried over again, and that the present conviction is therefore illegal

On this point, I observe, that the High Court quashed the whole of the original proceedings as being altogether without jurisdiction, and therefore illegal. The first trial was in fact no trial at all, and the result cannot be pleaded as *autrefois acquit*, it being essential to that plea that the first Court should have had a competent jurisdiction of the offence.

Before considering the evidence on the merits as affecting all the prisoners, I would remark on the exceedingly disproportionate punishment inflicted on prisoners Nos. 1, 2, 3, and 7. Supposing the case proved, the sentences on all those prisoners are utterly inadequate, notably so in the case of the Police Inspector, who has been sentenced to 3 years' imprisonment only; and I entirely dissent from the Judicial Commissioner's argument that former good character or service should be, under the circumstances of this case, a ground for diminution of punishment.

To return to the record, however; for convenience sake, I will take up the appeal of

Muthoorapershad first. He has been convicted, (1) of having abetted the bringing of a false charge of murder, knowing that there was no just ground for such proceeding, and (2) of preparing an incorrect document purporting to be a statement made by Sajeebun Sing and Gujna Dhobee, with intent to cause injury to them, he being a public officer.

He urges in appeal that the facts on which the Deputy Magistrate has based his judgment are not borne out by the evidence; and that, were they so borne out, they would not justify a conviction.

Now the first thing that strikes me in going into the case against Muthoorapershad, is the extreme *primâ facie* improbability of the prisoner having acted as he did, knowing that the charge of murder was false. According to the evidence, he went heart and soul into the matter, wrote numbers of reports, bullied men and women whom he thought knew anything of the matter, beat and otherwise mal-treated those whom he afterwards sent in as witnesses, and all this he did, knowing that the man Ramsurun was not only not dead, but was only distant a few miles, knowing moreover that he might be expected at any moment to make his appearance, and confound the Police Officer's machinations.

That Muthoorapershad commenced the enquiry, believing the story of Ramsurun's death, is admitted; and to bring the present charges home to him, it must be shewn on such evidence as to leave no reasonable doubt on the mind that he almost immediately discovered the falsity of the first report, and yet entered into a scheme with others to bolster up its authenticity for the purpose of bringing a false charge against persons with whom he had no acquaintance and no enmity. It is not enough to prove that the Police Inspector acted carelessly or rashly or even with criminal neglect of his duty; it must be distinctly shown that in preferring the charge of murder he did it *malâ fide*.

Now, on looking at the evidence, although I find ample proof of Muthoorapershad's folly, ignorance, and worse, there is nothing in it which to my mind proves him guilty of the heavier offence. That he exerted himself to collect evidence in all sorts of ways, that he ill-treated witnesses till they promised to depose as he wished, that he stupidly allowed himself to be altogether led by the statements of the other prisoners, is clear. He showed himself utterly unworthy of the post he held, to be ignorant, tyrannical, and in short almost everything that a Police Officer should not have been; but all this does not prove that when he made the charge against Purushunt and others, he knew of Ramsurun's being alive, or that, when he sent in his report, he did so knowing it to be false. His conduct appears to me to have been that of an unscrupulous man, eager to earn a name for smartness and capacity, and caring nothing how he managed so as he got up a good case. I might even go so far as to admit, for the sake of argument, that he knew that the witnesses whom he mal-treated were ignorant of the murder, and that notwithstanding that he tried to make them depose as he wished; but even this is no proof that the Inspector himself knew of the falsity of the charge. He might be found guilty generally of fabricating evidence, but not of the crime of which he is charged.

In cases like the present, the knowledge that a charge is a false one, must be inferred from the circumstances, judged of according to the facts as they were known or supposed to be, when the charge was made. Now there can be no doubt that, when the man Julika went to the thanna to report, the Police Inspector believed the man's story; and there was nothing in the after and more complete enquiry to make him *necessarily* think that he had been deceived. There were rumours that Ramsurun had run away, but there were also rumours that he had been murdered, and as the recusant witnesses ended in acknowledging the latter fact to be true, it can hardly be wondered at if Muthoorapershad thought it true likewise; it must not be forgotten that the prisoner would, from his antecedents, be naturally inclined to follow out what used to be a very common method of obtaining evidence, and to care little how he got the testimony he wanted, provided that he did get it.

With regard to the human bones, &c., on which considerable stress has been laid by the Judicial Commissioner, I do not see that the fact proves anything. It would not be easy for a non-professional man to distinguish between male and female bones; but granting the prisoner's knowledge, it would still be only a proof of his unfitness for office: he might still have believed that Ramsurun had been murdered, although he knew that the bones found were not his bones.

The prisoner's Counsel has dwelt at considerable length on services rendered by

Muthoorapershad, and on the fact of his having saved European life during the mutiny. But this is beside the question; and the only thing, perhaps, deducible from it, is that the prisoner, from his antecedents and character, was altogether unfitted for the post of Police Inspector, and might be supposed to have fallen an easy dupe to Bengalee intrigue.

Taking, however, all the evidence into consideration, I think that the presumptions against the prisoner (and all the evidence against him is presumptive) are more than neutralized by those in his favor; and that, taking the most unfavorable view of his case, he is entitled to the benefit of the doubt.

I would acquit this prisoner.

I see no reason to interfere with the decision of the Judicial Commissioner in the case of prisoners Nos. 1, 2, and 3. They are distinctly proved by the evidence to have been the prime movers in the whole business—to have got together the persons who were to give evidence—to have managed the affair of the bones—to have given up their house to the Police Inspector—and to have pushed on the enquiry against Lalla Purushunt and his relatives with the greatest eagerness. It is also established that they were at feud with the Lalla on account of land. The witnesses for the prosecution depose most distinctly on these points, and I can see no ground for ignoring their statements. If they are to be trusted, the prisoners knew all along that Ramsurun had gone to his house, and that the charge of murder was absolutely false. Doubtless, there remains in their case the same *primâ facie* improbability as that noticed before; but there is this difference between the cases of these prisoners and that of the Police Inspector—in the one, the evidence was presumptive only, in this it is direct. Muthoorapershad might possibly have known the truth—these prisoners, if the evidence is to be believed, must have known it.

Prisoners Nos. 4 and 5 are guilty by their own admission. They confess that they knew the true state of the case, but urge that they were forced to give false evidence by the threats of the Police Inspector. This plea does not bring them within the exception in Section 94 of the Penal Code, as there was no apprehension of instant death before them, and could only operate in their favor by mitigating the punishment fixed by law for their offence. They have been sentenced each to five years' rigorous imprisonment, which is not too heavy a punishment.

With regard to the prisoners Nos. 6 and 8 also, I see no reason to interfere. It may be that the woman did at first think that Ramsurun had been made away with in spite of the information given her by Lalla Purushunt's family; but there is ample evidence to show that, after the Police took the matter up, both she and Jhilwah, prisoner No. 8, exerted themselves in getting up the false evidence on which the accused persons were arrested. It is possible enough that both these prisoners have been tools in the hands of the greater offenders, prisoners Nos. 1, 2, and 3; but they are clearly guilty on the evidence of abetting a false charge of murder, and their sentence is not too severe for that offence supposing the most cogent extenuating circumstances.

The sentence of 10 years' transportation passed on the prisoners Nos. 1, 2, and 3 on the counts is according to frequent rulings of this Court (*vide* Rule 3 of Criminal Order, No. 14, dated 20th August 1864) illegal. The sentence will be amended to one of 7 years' transportation and 3 years' rigorous imprisonment; to commence either before or after the heavier sentences. The fine will, of course, stand.

The case must be laid before my colleague, Mr. Justice Kemp.

Mr. Justice Kemp.—I have considered this case carefully. My colleague proposes to acquit the prisoner No. 7, the Police Inspector, and with this view the papers have been sent to me. My learned colleague has entered into the case so fully that I have little to add. The essence of the charges against the prisoner is that he acted as he did with a guilty knowledge. On a review of the whole evidence and circumstances of this case, I am satisfied that the prisoner's conduct was influenced by the conviction that a man had been murdered. These proceedings were certainly most unjustifiable, and such as shew him to be quite unfit to be a Police Officer, however, meritorious his past services as a soldier may have been. He did what almost all the darogahs of the old school did, and some of the new Police still do, *viz.*, resort to torture to extract a confession. But that he knew, at the time that he did so, that no murder had taken place, and that the man was living and within a short distance, I cannot credit. I concur in acquitting him of the charges made against him. I trust that he will be removed from the Police Force.

The 23rd January 1865.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Robbery—Theft—Jury (Verdict of).

Queen *versus* Sakhaut Sheikh.

Committed by the Deputy Magistrate of Junghpore, and tried by the Sessions Judge of Moorshedabad, on a charge of Robbery.

In a trial for robbery, it is competent to the Jury, if they disbelieve the evidence as to the assault (*i. e.*, as to the circumstances of aggravation) to bring in a verdict of guilty of Theft.

Mr. Justice Glover.—It appears to me that the Sessions Judge was wrong in refusing the verdict of "theft" which the Jury wished to give.

The prisoner was charged with robbery; he was a peon employed by the prosecutor, and on the occasion in question was journeying in company with his master, and carrying a bag of money. He is said to have seized the opportunity of the prosecutor Lakim Mundle's back being turned to knock him down and make off with the money.

No doubt, if this evidence were believed, the offence would amount to robbery; but the credibility or otherwise of that evidence was a question for the Jury, and they wished to decide it in the prisoner's favour, and to bring him in guilty of the lesser offence of theft.

I do not understand how the Judge considered such a finding as contrary to law. It might or might not have contrary to the weight of the evidence; but that was a point on which the Jury were the sole Judges, and the Judge had nothing to do but receive their verdict as given.

Under a conviction for robbery, the prisoner has been sentenced to 7 years' rigorous imprisonment, whereas, had he been convicted according to the verdict which the Jury desired to give, the limit of his punishment would have been three years.

He appears, therefore, to have been improperly prejudiced, and, in my opinion, this conviction should be quashed and a new trial held.

The papers must be laid before Mr. Justice Kemp.

Mr. Justice Kemp.—The prisoner has not taken the point of law; but as the error of the Judge has prejudiced the prisoner, I am of opinion that this Court is competent to notice the point.

If the statement of the prosecutor as to the assault by the prisoner be credible, the offence committed by the prisoner was robbery. The Jury, who are the sole Judges of a fact of this nature, disbelieving the evidence of the assault, that is to say, the circumstances of aggravation, brought in a verdict of guilty of theft. The Judge refused to receive this verdict, being of opinion that it was illegal as contrary to the evidence, and directed the Jury to re-consider their verdict. The Jury then brought in a verdict of guilty of robbery. The conviction must be quashed as proposed by my learned colleague, and a new trial held.

The 24th January 1865.

Present:

The Hon'ble J. P. Norman, *Officiating Chief Justice*, and the Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Judgment of Sessions Judge (confirming illegal sentence of Assistant Magistrate) —Appeal.

Queen *versus* 1. Mohesh Chunder Chuttopadhia, 2. Madhub Chunder Chuttopadhia, 3. Huris Chunder Biswas, 4. Gobindo Chunder Chuttopadhia, 5. Ramgotee Gosai, 6. Issur Chunder Sen, 7. Rai Churn Chuttopadhia, 8. Bunwaru Dass, 9. Gobind Dass Byraghee, 10. Kurum Sheikh.

Committed by the Assistant Magistrate of Kooshteah, and tried by the Sessions Judge of Nuddea, on a charge of Rioting and Abbetting the same.

The Assistant Magistrate having decided a case without examining the witnesses for the defence named by the prisoners, the Sessions Judge, on appeal, ordered the evidence of those witnesses to be taken by the Assistant Magistrate. Their depositions having been returned to him, the Sessions Judge proceeded to deal with the case under Section 422 of the Code of Criminal Procedure, and, convicting all the prisoners, confirmed the judgment and sentence passed by the Assistant Magistrate. HELD that the judgment of the Sessions Judge (though in form confirming the Assistant Magistrate's judgment and sentence) was in substance an original judgment, and that, under Sec-

tion 498, an appeal lay from it to the High Court upon the merits.

With reference to the evidence and the probablities of the case, the majority of the Court (*dissentiente* Norman, C. J.) acquitted the prisoners.

Mr. Justice Kemp.—THIS is an appeal from the decision of the Sessions Judge of Nuddea, Mr Rivers Thompson, dated the 19th of December 1864.

The prisoners from Nos. 3 to 10 have been convicted of the offence of rioting; and the prisoners 1 and 2 of abetting that offence.

A preliminary objection is taken by the learned Counsel for the prosecution, that no appeal will lie to this Court. I am of opinion that an appeal will lie, and that the prisoners, appellants, are entitled to be heard on the merits of the case. The conviction by the Assistant Magistrate of Kooshteah was wholly illegal; the Sessions Judge, on appeal, exercising the power vested in him by Section 422 of the Code of Criminal Procedure, directed the Assistant Magistrate to take evidence, "bearing upon the guilt or innocence of the prisoners," which the Assistant Magistrate had omitted to do. The result of the further enquiry was certified to the Appellate Court by another Officer, who had succeeded in the meantime to the office of Assistant Magistrate of Kooshteah, and the Appellate Court proceeded to pass the sentence which that Court deemed to be a just and proper one. This sentence is, therefore, the sentence of the Sessions Judge, for which that Officer alone is responsible; and an appeal will lie to this Court on the whole case. The mere coincidence of sentences, and the fact that the Sessions Judge has not thought proper to enhance or mitigate, but has passed the same sentence as that originally passed by the Assistant Magistrate in the trial which was no trial at all, ought not to deprive the prisoners of the benefit of an appeal to this Court on the facts. It is satisfactory to think that in a case of this importance, the Court is so far unanimous in opinion that the prisoners are entitled to be heard on the facts.

The case itself is one which happily is not of common occurrence elsehwere, but is peculiar to the disturbed Indigo districts of Nuddea and Jessore. It is not a pleasant picture—that of three Europeans beaten by a Native rabble. The prosecutor is Mr. Charles Meares, an Assistant Indigo planter employed by Mr. Hills. The European witnesses who have been examined are three in number,—Mr. Meares, Mr. Thomas Savi, also an Assistant Indigo planter under the same employer, and Mr. F. Abbott, who is unconnected with Mr. Hills. This gentleman is a cousin of Mr. Meares, and was residing with him as his guest when the riot took place. The native witnesses for the prosecution are five in number,—No. 1, Jugoo Biswas, an Ameen of the factory; No. 2, Kurrum, a Tagadageer of the factory; No. 3, Kasissur Mookerjee, a Tehsildar; No. 4, Ramchund Roy; and No. 5, Budyanath Chatterjee; inhabitants of the village of Doorgapore where the riot took place, and who are alleged to be independent.

A few words as to the prisoners Mohesh Chunder Chuttopadhia and Madhub Chunder Chuttopadhia, whom I shall in the sequel of my judgment style Mohesh and Madhub for the sake of brevity, are two brothers, residents of Doorgapore, men of substance and great local influence. Mohesh, the elder brother, is notorious as the staunch advocate of the weaker cause—that of the ryots—throughout the unhappy indigo controversy. It is not too much to say that Mohesh is obnoxious to the planters. The Sessions Judge tells us that he is "especially so to Mr. Meares." Mohesh has been employed under the Government as a Fouzdaree Serishtadar, and it may be assumed that he is well up to all the tactics and dodges of a case of this discription. The prisoners, Hurrish Chunder Biswas No. 3 Gobindo Chunder Chuttopadhia No. 4, Ram Churn Chuttopadhia No. 7, are all Brahmins, serving as tehsildars under Mohesh; these three prisoners are "*kulum pesha-loq*" as the natives would term them, "men of the pen." The prisoners Ramgotee Gorie No. 5, is an inhabitant of Doorgapore, and a ryot of prisoner No. 1; he gains his livelihood by selling oil, and is described as a "quite inoffensive man." Issur Chunder Sen, prisoner No. 6, also an inhabitant of Doorgapore, is, as far as can be ascertained from the record of the case, unconnected with the two prisoners, Nos. 1 and 2. Bunwaree Dass, prisoner No. 8, is the *bundaree* or cook of the two Baboos Mohesh and Madhub. Gobindo Dass Byraghee, prisoner No. 9, is also a domestic servant of those two gentlemen; and Kurum Sheikh, prisoner No, 10, the only Mahomedan who figures in this case, is the ryot of Mohesh and Madhub. The main facts of the attack upon Mr. Meares and his companions (for that they were attacked is beyond doubt) are fully and correctly stated by the Sessions Judge, and I shall not repeat them. In this appeal I have to con-

sider this question alone—did the prisoners Mohesh and Madhub abet that attack, and the other prisoners take any part more or less active in that attack? If there be reliable evidence that they did so, the conviction is good, and the sentence passed is certainly not too severe.

I take the European evidence first. It appears that Mr. Meares almost immediately after the attack proceeded by train to Kooshteah, and complained to the Assistant Magistrate Mr. Kemble. That officer, with a promptitude which is most creditable to him, at once proceeded by train to Alumdangah, and from thence to the village of Doorgapore, the scene of the attack. Mr. Kemble arrived at Doorgapore at about 3 P. M., on the day of the riot, which, by all accounts, took place at 9 A. M. He then proceeded to the house of the prisoner Mohesh, and commenced his investigation. Mr. Meares then made his statement, (the Sessions Judge is in error in treating this as a deposition). This statement, which is of the utmost importance with reference to the whole case, and the subsequent deposition of the witness, Meares, is here given "*in extenso*."

Mr. C. Meares complains that he was attacked at Doorgapore by some men with spears and latees, one of whom speared his horse *from behind*—Points out now at Mohesh Chunder's house as *among those who were of the party*.

1. Mohesh Chunder Chuttopadhia.
2. Hurree Biswas.
3. Ram Churn Chatterjee.
4. Bunwaree Doss.
5. Gobindo Doss.
6. Madhub Chunder Chuttopadhia.

The Assistant Magistrate, observing that it "was too late to proceed further in the case on that day," directed the six men named above to furnish bail each to the amount of rupees 500. Mr. Meares was instructed to appear on the morrow with his witnesses. This order is dated the 26th September 1864.

The case was disposed of by Mr. Kemble on the 29th of September. No reasonable time was given to the prisoners to prepare their defence or to secure the aid of legal advice, though they applied for only a day for that purpose. The consequence was that the witnesses were subjected to no cross-examination worthy of the name; and here I regret to record that the Assistant Magistrate, who displayed so much energy in the commencement of the enquiry, so far lost sight of all the first principles of justice, and fair play in his unseemly haste to get rid of the case, that he neglected to summon and examine the witnesses cited for the defence. This gross injustice, I am happy to say for the ends of justice, was rectified by the Sessions Judge, and the prisoners have on the whole no reason to say that they have not had a fair trial. To return to the case, it will be observed, that on the 26th of September, the very day of the attack, indeed, a very few hours after its occurrence, when it may be fairly assumed that the whole facts of the case were fresh in the memory of Mr. Meares, he distinctly stated that the two brothers, Mohesh and Madhub, two of their tehsildars, and two of their domestic servants, were of the party who had attacked him on that day; and further, that they were armed with spears and sticks. Now, what do we find Mr. Meares deposing to on the 27th, the next day? He does not mention the two brothers whom he had denounced on the 26th as of the party who attacked him or as taking any part in that attack. He shrinks from doing this; he leaves this to be done by less scrupulous witnesses. He deposes that, when he passed the front of the house of Mohesh on the day of the attack, Mohesh and Madhub were "sitting on a log of wood at the door;" that "he did not see Mohesh when he was attacked;" that "the men who attacked him were *village* men," amongst whom he recognized Bunwaree Doss No. 8, Hurrish Chunder Biswas No. 3, Govindo Doss Byraghee No. 9, and Ram Churn Chatterjee No. 7. He goes on to state that when the villagers attacked him, he heard "some one from behind backing them up." Now, who are the men whom Mr. Meares recognizes as amongst those villagers who attacked him or his party? They are—*first*, the cooks of Mohesh. Mr. Meares admits that he had only seen Mohesh, the master, twice before the attack. Are we to suppose that Mr. Meares was so well acquainted with the person and features of the servant, that he could recognise him in a sudden attack made upon him, and which by his own account could not have lasted many seconds, for he describes it thus—I quote his own words—"They all rushed at me at once. I rushed past them (it must be remembered that Mr. Meares was on horseback); and as the first man struck at me with a stick, I struck at him and *hit something* and rode on?" So precipitate was Mr. Meares's retreat that he did not even turn back to lend a helping hand to Mr. Savi, a

brother Assistant, whom he had brought into the mess, though he admits that one hasty glance behind, as he fled from the tehsildar and cooks, shewed to him Mr. Savi on the ground, unhorsed and helpless. Then who are the other men whom he alleges that he recognized in the *melée?* Two tehsildars, and strange to say, another domestic servant of Mohesh Baboo. Are these the kind of men who take a part in attacks of this description? Are lattyals no longer to be hired in Bengal? My past experience of the natives extending over 34 years, if worth anything, has taught me that these are not the kind of men who mix themselvss up in cases of this description—"well known men in the village—" "men in the service of the alleged prime mover of the whole affair." I regret to say that the evidence of Mr. Meares as to the recognition of these men has left anything but a favorable inpression on my mind, I would rather hope that he was mistaken as to their identity, than think that he has deliberately stated an untruth. In the matter of the abetment of the offence by the two brothers, Mohesh and Madhub, it must, I think, be admitted that the evidence of Mr. Meares does in no way implicate them.

The evidence of Mr. Savi implicates none of the prisoners. This gentleman states that he saw "four or five men near the porch of the house of Mohesh Baboo, all sitting on a log of wood;" that "the attack was made by 15 or 16 men; that 3 or 4 men came at him; that one man hit him on the thigh with a stick; that they struck his horse three or four times; that his horse fell into a ditch on the road side," and—here occurs an important passage—"a Brahmin helped me up," saying, "not this *saheb* if you want to beat, beat Mr. Meares." The witness goes on to say,—"I could not recognize any of the people who attacked us, or who were at the door." I heard *people* calling out, '*mar salako,*' from the door." It is remarkable that, although Mohesh was confronted with Mr. Savi, that gentleman was unable to say that Mohesh was the Brahmin who lent him a helping hand in his stress; and one, and only one, of the Factory servants, *viz.*, Kurum—who, if the European witnesses are to be believed, was on a head, and could not possibly have witnessed the charitable act of this Brahmin—ventures to swear that Mohesh was that Brahmin.

The witness, Mr. Abbott, a young man lately arrived in the country, admittedly ignorant of the lo the country, depose through some villag house he observed gated near the d unable to say whc men came from a the house and att says "one man at I could not recogn

This is the E proceed to comr dence, I have a fe the alleged origin the probabilities of of this description with native witne and who, in this hostile to the prisc we ought not to lo

It is alleged th taken up some l Where this land i is very clear, that record, nor is it Madhub had any land. Mr. Meare words—that "he l "that the ryots c not mention the "to sow down th "crop." On the n Meares, with Mes the two Factory Kurum Tagadagh lands, expecting, a but they found n is nothing to conn with these lands. this is an impor motive why the t that particular Meares, accompani pean gentlemen, available as witne Mohesh should sel the high road of l the scene of the at It was pertinently the learned Coun Mohesh with his g bring a cloud of wi of being personally but that he coul "*locus in quo.*" bilities, is it not perience in these n Gentlemen, brothe delicate, should s

We think that the true effect of the Judges' decision was to quash the trial and conviction before the Assistant Magistrate, in which the evidence on one side only was heard; that the judgment of the Sessions Judge was in substance, though not in form, an original judgment. That being so, it is clear that the conviction now appealed against was a conviction on a trial held before a Sessions Judge within the meaning of those words in Section 408; and that from such a conviction an appeal lies to this Court. In this view of the case, it is wholly immaterial whether the sentence passed by the Sessions Judge corresponded with that of the Assistant Magistrate or not.

We must, therefore, go into the case upon the merits.

On the 26th of September last Mr. C. Meares of Pomiaree Factory, an Assistant of Mr. Hills, accompanied by Mr. Abbott, a cousin, who was staying with him, went to the Doorgapore Factory. They were met by Mr. Savi, also an Assistant of Mr. Hills, who lives at the Paikparra Factory. Meares asked Savi and Abbott to accompany him to see some lands which he said some villagers had threatened to sow with *kulaye*. He said he had heard that the ryots had threatened to beat him. On arriving upon the land, they found no ploughs there, nor any sign of *kulaye* being sown. Juggo Biswas, the Ameen, and Kurrum, the Tagadageer of the Doorgapore Factory, were on the ground. Mr. Meares deposes that shortly after they left the ground, he saw a man sitting on the road with a stick in his hand, who, on seeing the party coming, got up and ran towards the village. The witness Kurrum recognized this man as the prisoner Hurree Biswas, who is the tehsildar of the prisoner Mohesh Chunder Chatterjee. Soon after this, they met Kashishur Mookerjee, a tehsildar of the Doorgapore Factory. He told Mr. Meares and his party to stop, as a number of people were collected at Mohesh Chunder Chatterjee's house. Mr. Meares said he did not care, and proceeded onwards the village. He says—"As we passed by the house of Mohesh Chunder Chatterjee we saw some men in front of us. As soon as they saw us, they rushed at us with sticks and spears. They were village men. This was after we had passed the door of the house. The men came from round the corner of the house. They first came at me. They did not touch me. They then went at Mr. Abbott who was on the left of me, and Mr. Savi who was behind us. We all galloped off. Mr. Savi fell; I turned round and saw him on the ground. He got on his horse again and followed us on. We did not turn back to help him. When we passed the front of the house, Mohesh Baboo and Madhub Baboo were sitting on a log of wood at the door. I did not look back after the men attacked us. I did not see the Baboo then. We did not exchange words when we passed the door. When the men attacked us, I heard some one from behind backing them up. I can't say whether it was the Baboos or not. I recognized amongst the men who attacked us this man amongst Bunwaree Doss, Gobindo Doss Byragee, Hurrish Chunder Biswas, Ramchurn Chatterjee. (Mr. Kemble notes that these men were pointed out as they stood in the room, and had been pointed out at the house of Mohesh Chunder on the previous day.) On my arrival at home, I found that my horse had received a spear wound through his stiffe. They all rushed at me at once. I rushed past them, and as the first man struck at me with a stick, I struck at him, hit something, and rode on. I did not pass the village on the way to the fields. I had no words with any one. The attack was entirely unprovoked."

On cross-examination by Mohesh Chunder he said—"I have been along the road before. I go along it very seldom. I have sometimes seen Mohesh Chunder Chatterjee; I have seen him twice before, that on the river bank, not on the road by his house. Mr. Abbott is my cousin, who is on a visit to me. Mr. Savi came to see the Naib at Doorgapore. I think I saw him at the Factory, and asked him to come along with me."

To the Court.—"I asked Mr. Abbott and Mr. Savi to accompany me, as I anticipated that there might be a row on the land I went to see. The ryots, I heard through my servant, had threatened to give me a beating."

In answer to a further question by the Court or some other prisoner, he said—"When I passed the door I saw Ramchurn Chatterjee and Hurrish Chunder Biswas at the door. I did not see them afterwards."

Mr. Savi, the next witness, states that a Brahmin tehsildar came and told Mr. Meares that some people were collected in the village along the road. He says—"Soon after, near a *puckah* house, I saw four or five men near the porch-way, all sitting on a piece of wood: about fourteen or fifteen men in front of the house: three had spears I think, all the rest sticks. They attacked Meares and Abbott first; I was behind. I saw a

man spear Mr. Meares' horse. I think he intended to spear Mr. Meares. Another man struck at Mr. Meares with a stick. He warded off the blow. Three or four men came at me. One man hit me on the thigh with a *lattee*. They struck my horse three or four times. My horse fell in a ditch by the road side, and I was hurt, bruised by the fall. The skin has been taken off my leg; my leg is bruised by the blow of the *lattee*. A Brahmin picked me up and said—'not this *saheb*; if you want to lick, lick Mr. Meares'; they left me and followed Mr. Meares to the ghat. I cannot recognize any one of the people who attacked us or who were at the door. I heard people calling out *mar salako* from the door."

Mr. Francis Abbott says—"Near a large *packah* house near the door, four or five men were congregated. I cannot say who they were; some more came from a sort of passage leading to the house. They attacked us; one man attacked me. We rode off. I cannot recognize any one of them. Before we reached the house a man spoke to my cousin. I do not know what he said. I understand Bengallee very very slightly. I heard a scrimage behind. I saw Mr. Savi on the ground; I did not see Mr. Meares' horse speared. There was a bush near the door of the house; the men came out of that; two men of the Factory were ahead of us."

Jugoo Biswas the Ameen says—"I was behind the *sahebs* when we reached the house. Kurrum was ahead. There is a log of wood near Mohesh Chatterjee's house; on that Mohesh Chatterjee and Madhub Chatterjee were sitting; Ram Churn with some others were near them; near a *poojah* house about 10 or 15 men were collected; two or three had spears, the rest sticks. I heard Mohesh Chatterjee call out *mar mar;* these men then attacked Mr. Meares. Ramgoti Gorai struck at him with a stick; Mr. Meares warded the blow; Issur Sein thrust at him with a spear; he struck the horse with it. One man named Kurrum Sheikh hit Mr. Savi. Ram Churn Chatterjee hit me with a spear. I recognized among the men besides these, Gobindo Doss, Gobind Chatterjee, Huree Biswas. There were other lattials whom I could not recognize. There was no dispute at the door. I cannot understand the cause of the row. I have given evidence for the *saheb* before, and have been beaten too."

Kurum Tagadageer says—"I was before the *sahebs*. On arrival at the Baboo's house, four or five people were sitting there, Mohesh Chatterjee, Madhub Chatterjee, Dwarkanauth Chatterjee, Gobindo Chatterjee, Ram Churn Chatterjee. I heard Mohesh and others say, *mar salake*. Near the Bodonghur, a *poojah* place, some ten or twelve men came out with *latees*, *soorkees*, &c. They set on us. Ramgoti Gorai hit at Mr. Meares with a stick, and Issur Sein with a spear, and struck the horse behind. Mohesh Baboo said, 'not this *saheb*, Meares *saheb*. I then called, *dohai*." On cross-examination —"I have given evidence against Mohesh Chatterjee before. Gobind Doss had a spear, Bunwaree also, I was too much afraid to see more."

Kashishur Mookerjee says, "I was passing to my work through Doorgapore; I met Hurree Biswas running from the *kashbarree* towards Mohesh Baboo's house. I asked why he was running. He gave no answer. I afterward met the *sahebs*, and told them there was a collection of men at Mohesh Chatterjee's house. I had seen the men there as I passed: I saw sticks in the hands of some. I suspected something was wrong, as Suffur Ali and others had lately held meetings with Mohesh Chatterjee. So I told Mr. Meares. Mr. Meares would not listen to me, but went on his road. I turned back with them. I saw Mohesh Chatterjee, Madhub Chatterjee, Ram Narian and Bunwaree in front of the house; Mohesh Chatteriee said, *mar salake*. From the Bodonghur 10 or 12 men came out with sticks and spears; one Ramgoti struck at Mr. Meares, then Issur Sein thrust at him with a spear, and speared his horse. Mr. Savi who was behind was attacked by Kurum Sheikh; his horse fell on him. I saw besides the two Baboos, Ram Narian Chatterjee, Gobindo Chatterjee, Gobindo Doss, Bunwaree, Issur Sein, Kurum Shaik, Dwarkanath and others, whom I do not know. Issur Sein, Bunwaree, and Gobindo had spears. I had a caste quarrel with Mohesh Chatterjee; we do not eat together now.

This is the evidence of Mr. Meares and the Factory servants who were with him; it was taken at Doorgapore on the 27th September. The Assistant Magistrate mentions in his judgment that Mr. Hills requested that the evidence of some of the independent villagers, a number of whom were by at the time, might be taken. He said they would not come without a summons. A summons was issued, and Ram Churn Roy and Buddinath Chatterjee were examined at Kooshteah on the 27th of September.

In the list of witnesses given by the complainants on the 27th September, are their names as well as those of Roghomoney Bhuttacharjee, Taranichunder Chattopadhia, and Oomachurn Banerjee.

Ram Churn Roy says—"I live at Doorgapore. I am a mahajun. I have nothing to do with the Factory. I was present when Mr. Meares' horse was speared on Monday morning, that is, the 11th of Assin. I heard a noise in the road. I saw three *sahebs* on horse back in front of Mohesh Chatterjee's house. I ran up to see what was the matter. I heard the two brothers Mohesh Chatterjee and Madhub Chatterjee give orders, saying '*mar salake, mar*.' About 15 or 16 men with sticks and spears, and a lot of village people were there; some one I saw speared the horse. I think it was Issur Sein. I think so because I saw a spear in his hand. I saw him run up just before I saw the blood coming from the horse, I saw a *saheb* fall. I expect he must have been hit; sticks were lifted and blows struck. Among the people with sticks and spears, I recognized Issen Chunder, Gobind Doss, Bunwaree; these had spears, Hurree Biswas, Ram Narain Chatterjee, Gobindo Chatterjee, Ramgoti Gorai, Kurrum Sheik, had sticks. Others were there whom I could not recognize; some of those came out of the *thakoor bari* which adjoins Mohesh Baboo's house and belongs to Bissumber Bose. The people I have named are Mohesh Chatterjee's servants. When I saw the *sahebs* coming, I had gone for buying a stamp at Oomachurn's shop. I did not see any lattials or any crowd before I saw the *sahebs*. The stamp shop is less than a *rasi* from the house. I was in the shop when I heard the row and went out.

By the prisoner.—"I saw two *sahebs* ahead. Mr. Meares was behind. M. Meares fell. I am on bad terms with Mohesh Chatterjee—caste quarrel, and some cases in Court. I have a quarrel with Gobindo Dass." He adds:—"The Baboos were standing by a log of wood by the door—I have never seen the two brothers standing there before." On his evidence being read over to him, he added:—"Some of the people are Mohesh Chatterjee's servants, *viz.*, Gobindo Chatterjee, Hurru Biswas, Bunwaree, Gobindo Dass lives there, Ram Narain Chatterjee.

Buddinath Chatterjee says—"I live at Doorgapore. I am in the service of Ram Sunker Adhikari, mahajun. I have no connection with the Factory. I was sitting in Oomachurn's (the stamp vendor's) shop on Assin the 11th, when I heard a noise and a shouting of *mar mar*. I went out. I, and Taran and Oomeschurn went out. I saw three *sahebs* on horseback surrounded by men with sticks. I recognized Mr. Meares with a stranger and Mr. Savi. Mr. Meares and the other *sahebs* rode off, the lattials with them. Mr. Savi fell. I went near him. The people said, *yih sahib hai ne hai ne*. I saw Mr. Meares' horse bloody. I did not see him struck. I do not know who said *mar mar*. I was in Oomachurn's shop. I only went as far as where the *saheb* fell. I can't say whether Mohesh Chatterjee was there or not. I recognized Bunwaree and Ramgoti. I forget the others; some had spears, some sticks."

By the Prisoners.—"Three or four of the men ran after Mr. Meares, when he went away. I can't say whether they came back. I do not know what Ramgoti and Bunwaree had in their hands. Oomahchurn's house is about two *rasees* from Mohesh Baboo's. I do not eat with Mohesh Chatterjee. My master is not on good terms with Mohesh Chatterjee."

This is the whole of the evidence for the prosecution; the fact that a riot and assault took place is undisputed; the question is, who were the rioters? It will be convenient to consider the cases of the defendants separately.

Essur Sein is a ryot, an inhabitant of Doorgapore. That he was the person who assailed Mr. Meares with a spear and wounded his horse, is proved by Kashishur Mookerjee, Juggo Biswas and Kurum Tagadageer. Ram Churn Roy proves that he had a spear in his hand. It is not suggested that either of these parties are at enmity with him. His defence was, that he was at a village called *Chedomparah* where he had gone to cultivate *kulaye*, and he names three witnesses—Kokaram Mundul, Boidonath Mundul, and Hurro Mundul as capable of proving his allegation. But on the remand neither of them were called. In the same manner it is proved that Ramgoti Gorai, the oil man, hit at Mr. Meares with a stick, and that Kurrum Sheikh, a ryot, inhabitant of Doorgapore, struck Mr. Savi. Ramgoti says, in his defence, that he was selling oil at Mayhooree, and returned about half past one; he names five witnesses, none of whom are called to prove his *alibi*. Several witnesses for the defence were questioned to show that they did not see him present at the scene of riot. One of

them, Dwarkanath Mozoomdar says:—"I know Ramgoti Goria, who lives at Doorgapore—he was there at the time of the attack. I know him well." He adds, "I don't think he is a lattial—I never heard any ill of him."

I must, therefore, pronounce the case as clearly proved against these three prisoners. Except the last, Kurum Sheikh, who is a ryot of Moheschunder Chatterjee, they are not shewn to be in any way connected with the two Baboos.

Bunwaree Doss, the cook of the defendant Mohesh Chunder, and Gobindo Doss Byragee, a domestic servant of Mohesh Chunder, were recognized by Mr. Meares amongst the men who attacked him. Gobindo Doss is also identified by Juggo Biswas. Kurum Tagadageer and Kashishur Mookerjee identified both prisoners, and say that each had a spear in his hand, and this is confirmed by the evidence of Ram Churn Roy. Buddinath Chatterjee, who seems to be anything but a willing witness, recognized Bunwaree Doss. Bunwaree's defence was an *alibi;* in support of which he cited five witnesses, and calls none. Gobindo Doss also an *alibi;* he cites five witnesses, and calls none. I think Mr. Meares' attention would be likely to be drawn to the men with spears; and I must pronounce the case, in my opinion, clearly proved as against these defendants.

I come now to the case of Mohesh Chunder Chatterjee. The first question seems to be, was he present at the commencement of the riot? Mr. Meares says, he saw him when he passed the front of the house sitting with his brother Madhub on a log of wood at the door. Mr. Savi does not identify him, but saw four or five men sitting on the log of wood. Mr. Abbott says only that he saw four or five men congregated at the door. Juggo Biswas and Kurrum Tagadageer observed him sitting on the log. Kashishur Mookerjee says he saw him in front of the house. In his own defence, in his petition of the 27th of September, apparently made after he had heard this evidence, he does not suggest that he was not present. He says—"The main object in lodging this false and fraudulent complaint is to harass your petitioner, and to make the ryots of his estate accept indigo advances. The facts are that, the plan having been previously concerted, the servants of the prosecutors placed early in the morning 10 or 12 clubmen and spearmen in the house of one Kashishur Mookerjee; and no sooner had they (the said servants) come to the scene of the occurrence, accompanied by the prosecutor and two other Englishmen with a view of securing evidence, than those clubmen appeared on the spot agreeably to previous direction; that with the aid of those clubmen they kicked up a row, struck the horse on the back when the prosecutor threw away his hat, and they all ran to the river side making a loud noise throughout, and a flesh wound was inflicted on that part of the horse's leg where it might not prove fatal. This wound was inflicted simply with the view of setting up a false complaint, and making the charge appear a serious one by displaying the wound to the Court." This defendant was in Court before us, and was pointed out by his Counsel; and, in my opinion, his personal appearance is such that he would be easily recognized by a person who had seen him once or twice. I have no hesitation in saying that I feel bound to accept Mr. Meares' statement that the Baboo was sitting on the log as the party passed his house, more especially as that allegation appears to me not to be denied by the Baboo himself, whose defence appears to state something which he himself witnessed.

Then being present, did he take a part in, or abet the riot? Mr. Savi says, "I heard people calling '*mar mar salako*' from the door." Mr. Meares, "I heard some one from behind backing them up—I cannot say whether it was the Baboo or not." Juggo Biswas says "I heard Mohesh Chatterjee cry out '*mar mar*.' Kurum Tagadageer—I heard Mohesh and others say '*mar salako*.' Kashishur Mookerjee says, "Mohesh Chatterjee said, '*mar salako*.'" I cannot think that the household servants and dependants of Mohesh Chunder Chatterjee would have taken a part in such an outrage before his eyes unless at his instigation or with his approval; and as I think it proved that these servants and defendants did take such a part, I cannot discredit the positive evidence of those who allege that he used the language attributed to him, confirmed as it appears to me by other incidents, and the circumstantial evidence in the case. I must, therefore, say that, in my opinion, Mohesh Chunder is guilty.

As only one witness speaks to the part taken by Madhub Chunder Chatterjee, and as there are some inconsistencies in the testimony of that witness, I would give Madhub Chunder Chatterjee the benefit of a doubt whether that witness may be mistaken or may not be speaking the truth, and I would acquit him.

Hurrish Chunder Biswas, a tehsildar of Mohesh Chunder Chatterjee, was recognized by Kurum Tagadageer, who identifies him as the man with a stick in his hand seen by Mr. Meares, who ran towards the village before the attack. Kashishur Mookerjee met him, and asking him what he was running for, got no answer. Mr. Meares saw him at the door of Mohesh Chunder's house. Juggo Biswas saw him amongst the rioters. Ram Churn Roy saw him armed with a stick. In his defence he alleges that he was during the whole morning occupied in the Cutcherry of Mohesh Chunder. He cites five witnesses to prove his *alibi*, but calls none. I pronounce him guilty.

Gobind Chunder Chatterjee, a tehsildar of Mohesh Chunder, is recognized by Juggo Biswas as present with the rioters. Kurum Tagadageer saw him near the door of Mohesh Chunder's house. Kashishur Mookerjee recognized him, and Ram Churn Roy saw him with a stick. His defence is, that he was collecting the rents of Mohesh Chunder's villagemajee. He cites four witnesses but called none. I think it is proved that he was present, but as the evidence of his participation in the riot is very slight, I would give him the benefit of the doubt, and acquit him.

The last case is that of Ram Churn Chatterjee, also a tehsildar of Mohesh Chunder. He is identified by Mr. Meares as having been present. Juggo Biswas says, "he hit me with a spear," Kurum Tagadageer and Kashishur Mookerjee saw him. His defence is that, on the 10th of Assin, Monday, he went by the one o'clock P. M. Train to Kooshtea, and remained at the lodging of his Master's mooktear, Ramgotee Mozoomdar, to see about a notice case of his master; that on the next day, the 11th, at about 10 o'clock, he appeared before the Deputy Collector, Baboo Tarrucknauth Mullick; at his sitting, and looked after that case, that at 1 o'clock Mr. Meares came to Kooshteah and filed an information before the Assistant Magistrate; that the Assistant Magistrate went to Doorgapore by the two o'clock train, where he and the mooktear, as well as the Sheristadar of the Magistrate, went together to Doorgapore. He cited four witnesses, and called two. The evidence of his first witness, the Mooktear, as taken down appears as follows: "The day before Mr. Kemble went down in this case for the first time, Ramchurn Chatterjee *came to my house* (*a*) returned to his house *next day* (*a*) *from mine where he had been the day before* (*b*); was at my house all night. He came down by the morning train, and went down with the Peshkar."

By Court. "I went down too. Doorgapore and Telkutt are one village. I had to get some money from my house to pay a mahajun. I am the Am-Mooktear of Mohesh and Madhub Baboos. Ram Churn came up to attest certain papers in an Act X case, but we could not manage it the day he came, or the day after. The attestations were completed at a subsequent date." The evidence appears quite incoherent, and the Magistrate records "that the witness was somewhat unsatisfactory as to manner. He was more like a trembling defendant than a witness."

The prosecutor, Mr. Meares, offered evidence to prove that Ram Churn Chatterjee went up to Kooshteah in the same train with himself: but as the Assistant Magistrate would not receive it, I can only take it as a suggestion. Certain it is that Ramgoti Mozoomdar went down in the same train with Mr. Kemble. He went to Mohesh Chunder's house and became security for the defendant's witnesses at Kooshteah.

I believe the evidence of the Mooktear to be false, and I find the *alibi* not proved. The facts seem to shew that the prisoner probably went to Kooshteah to fetch the mooktear on the 11th.

I would not convict the defendant Ram Churn Chatterjee.

It is unnecessary to discuss the general defence set up by all the accused, and attempted to be supported by the evidence of the witnesses for the defence, that the attack was planned, and made by persons employed by the Factory. There is not a particle of trustworthy evidence to implicate any body connected with the Factory with the riot.

Had the attack been by ryots of the village independent of Mohesh Chunder and his party as suggested, I think that they would not have had the slightest difficulty in bringing home the case to the parties really guilty, and so clearing themselves from the charge. But that has, in fact, never been the case made by the defendants themselves or any of them. Had they adduced evidence to show who the really guilty parties were, it would not have produced any impression in my mind unfavorable to their

(*a*) Struck out.

(*b*) Interlined in substitution for the words "next day."

case, had they mixed up with it an unfounded charge against the Factory servants of being privy to a disturbance which took them by surprise. The enmity between the parties might have led to such a suspicion on their part. But when they simply make a charge of conspiracy, and do not support or attempt to support it by such evidence as it must have been in their power to produce had they not been themselves guilty, I think that they are not entitled to ask us to disbelieve the clear, positive, and virtually uncontradicted testimony which fixes the guilt upon them. The sentence of six months' imprisonment, and a fine of Rs. 500 on the principal defendant, appear to me a lenient one.

I would affirm the conviction of all the defendants, except Madhub Chunder Chatterjee and Gobindo Chunder Chatterjee.

Mr. Justice Glover.—The circumstances of this very peculiar case have been so fully detailed in the judgment of the Lower Court, that there is no necessity for my going into them here. It will be sufficient to state that the prosecutor Mr. Meares, an Assistant Indigo Planter, in the employ of the Messrs. Hills, was, with his companions, Messrs. Savi and Abbott, (the latter a relative just arrived from England), set upon in the village of Doorgapore by a number of men armed with spears and sticks. That there was an attack upon these gentlemen in that village, there can be no question ; the point to be decided in this appeal is, who took part in it ?

But before entering on this question, an "*in limine*" objection taken by the respondent's Counsel, Mr. Evans, must be considered. It appears from the record that Mr Kemble, the Assistant Magistrate of Kooshteah, before whom the case was first heard, disposed of it adversely to the accused, without summoning or examining the witnesses named by them for their defence. They appealed to the Sessions Judge, who directed the Assistant Magistrate to take this evidence, and to return the papers to him; on their reaching his Court, the Sessions Judge passed sentence, the same as that already recorded by the first Court. Now, on this it is contended on the part of Mr. Meares that the Judge's proceedings were of the nature of an order in appeal ; and that, if they could be called in question at all, it could only be on a point of law, and not on the facts of the case. Mr. Evans also drew the Court's attention to Section 414 of the Criminal Procedure Code, and argued that as there was no specification in the law of a case like the one before us, the above-mentioned Section applied and barred the appeal.

With regard to the first point, I observe that Section 444 of the Procedure Code allows an Appellate Court to direct further enquiry to be made, and additional evidence to be taken, and on it " to pass such judgment, sentence, or order as to such Court shall seem right;" in other words, an Appellate Court, under this Section, could enhance a sentence if it thought proper. Now, supposing the case to be an ordinary appeal, that Court would not have such power : and it seems to me, therefore, quite clear that an order passed by a Sessions Judge under Section 422 is an original order passed on evidence, which was not before the lower Court at all, and as such, is open to appeal, like any other original order on the facts. The fact of the Sessions Judge having passed the same order as the Assistant Magistrate has nothing to do with the question. He did not confirm the lower Court's order in the proper sense of the term, but imposed a sentence of his own ; and the wording of the Judge's decision that "the appeal should be dismissed," was not, in my judgment, a proper one with reference to the Sections above quoted.

It is true that, in the Code, no special notice is taken of cases like the present ; but I cannot think that the Legislature intended to exclude them. All criminal sentences (save those coming within the limit of Section 411) are once appealable on the facts ; and if the result of an Appellate Court's acting under Section 422, and sending for further evidence, is to take the case out of this category, then a Sessions Judge has only to call for further evidence, or to order further enquiry in any case, to do away with the law regulating appeals altogether, and practically to give himself a power of passing original criminal sentences (for he may alter in any way the first Court's order even to enhancing it) for which, if they are improper ones, there is no redress. I say again that I cannot and do not believe that the Legislature had any such intention ; and I think that, as the Sessions Judge in the present case interfered and passed a new sentence on new evidence, his order was appealable on facts as well as on law.

Now to come to these facts. The prisoners have been convicted of having been concerned in some shape or other in a riot, and assault on Mr. Meares and two other

European gentlemen in the village of Doorgapore. The evidence for the prosecution consists of the depositions of Messrs. Meares, Savi and Abbott, and of five Natives, two of whom are much relied on as "independent witnesses."

Mr. Meares states that he identified the prisoners Hurree, Ram Churn, Bunwaree, and Gobindo Chatterjee; he named the Baboos Mohesh and Madhub as being concerned, but did not (in his deposition on oath) say that they were of the number of those who attacked him, nor did he say that they were the persons who called out "*mar mar salako.*"

Mr. Abbott identified no one, neither did Mr. Savi, though he deposes to a very singular incident—he states that he was struck with a *latte* and thrown from his horse, the animal rolling into a ditch in consequence of the assault, and that a Brahmin came and helped him up, saying to the rioters "don't beat this one; if you want to beat any one, beat Meares *saheb.*" Mr. Savi did not identify this man, which, if the witness Kurum's statement be true, that it was the prisoner Mohesh, is most extraordinary, inasmuch as he, Mr. Savi, had Mohesh before him all the time the case was being investigated by the Assistant Magistrate; and as he had time and sense enough to know that the man who helped him was a Brahmin, he may reasonably be supposed to have been able to identify him as Mohesh, had he really been that man.

The European evidence then amounts to this: one witness identifies four of the prisoners, but cannot state that the prisoners Nos. 1 and 2 were urging them on; the other two prove nothing more than the fact of an assault taking place. I shall allude to this, and the other evidence more at large presently.

The so-called independent witnesses were in a stamp vendor's shop, variously stated by them to be 100 or 200 yards away from the scene of the riot; they depose that they ran out on hearing the *fracas*, and saw the prisoners attack the *sahebs*, their evidence is opposed on many points to that of the other witnesses, and considering that the assault was over in a few seconds, it is not easy to see how they could have been in time to notice any particulars of the skirmish.

Of the five native witnesses, three, I observe, are not only Factory servants, but have special reasons for being inimical to the prisoner Mohesh; and with Mohesh must be included, for the purposes of this case, all the prisoners, who are, with one exception, perhaps, that prisoner's relatives, servants, or ryots.

For instance, Juggo Biswas has given evidence before (against Mohesh) on the part of Mr. Meares, and has according to his own account, been beaten in consequence. Kurrum has likewise given evidence before against Mohesh, and is on bad terms with him. Kashishur has a caste quarrel with him, and both the so-called independent witnesses admit that they are on bad terms with the prisoner. It is a singular that only those persons who are named by Mohesh in his petition to the Assistant Magistrate begging that his witnesses might be examined, as being his bitter enemies, were summoned and examined for the prosecution.

The story for the defence is, that the whole thing was got up by the prosecution itself; that the attack was a sham one, and the men employed in it Factory lattials. Witnesses, Nos. 9, 10, 11 and 12 depose to the fact of an attack by people whom they did not recognize, and state that the lattials followed the *sahebs* to the ghaut and crossed it with them.

Three other witnesses depose that the stick-men were either in or came from Kashishur's house, and that there were none near Mohesh's. So far the direct evidence, which, as might be expected, is of the most conflicting nature. The fact is that the importance of this case to either party is not to be measured by its present effects. The prisoner, Mohesh, notoriously represents the anti-planting feeling prevalent in some parts of Eastern Bengal. He has been mixed up with it in many ways from the first; and it would be folly in balancing the evidence in this case, to ignore the fact that he would naturally be the man of all others, whom Factory officials, such as Tehsildars, Ameens, &c., &c., the direct go-betweens of planter and ryot, would like to see put out of their way. Neither, on the other hand, must it be forgotten that Mr. Meares himself (I quote from the Assistant Magistrate's Statement) is a very unpopular man, that he has given great cause of offence to his villagers, and that they "might be expected to attack him any day." That there was some such expectation on the 26th of September, Mr. Meares himself admits. He admits knowing that some of the ryots intended to sow lands which he claimed for Indigo, with *kuloye*, and on that account asked Mr. Savi (another Assistant in the concern

of Messrs. Hills) to accompany him on his visit to the lands in question.

There would seem to be, therefore, one of three hypotheses possible—either that the attack was made, as stated for the prosecution, by Mohesh and his party; or that it was a sham assault got up by the Factory amlah; or lastly, that it was an attack planned and carried out by the ryots whose lands Mr. Meares intended to take or had taken for indigo, and regarding which, opposition was expected that very morning.

The second of these hypotheses, may, I think, be disposed of very shortly, and it was but fair that it should be so disposed of considering its bearing on the Factory officials, at once. The evidence of Mr. Savi distinctly proves that the assault was very far from being a sham. He was struck several times with a *lattee* and his horse was knocked into the ditch. Factory lattials would hardly have inflicted such injury on one of their masters, nor would one of them have used such words as the Brahmin used in *rescuing* Mr. Savi from his assailants :—"This is not the *saheb;* if you want to beat any one, beat Meares *saheb.*" I am quite ready to accept Mr. Savi's statement on this point in opposition to the vague and general allegations of the prisoners' witnesses, and have no doubt that, whatever the true nature of the attack was, the Factory had nothing to do with it; and, in justice to Mr. Meares, I think it but right to state my opinion that this part of the defence is absolutely false.

The evidence in support of the first is, as I have before stated, that of Mr. Meares, of the three Factory servants, and of the two 'independent' witnesses. The former does not implicate the two Baboos or any of the prisoners, except Nos. 3, 4, 5 and 6, Huree, Ram Churn, Bunwaree and Gobindo Chatterjee. Mr. Meares states that on passing Mohesh's house, he saw him and his brother Madhub sitting on a log of wood, that a number of men came from round the corner of Mohesh's house and attacked him. Of these, he recognized, as above stated, the prisoners, Nos. 3, 4, 5 and 6. He says nothing about either of the Baboos having taken part in or abetted the attack; for, though he states that he heard cries from behind urging on the assailants, he does not allege that they were those of Mohesh or Madhub's. In his original statement to the Assistant Magistrate (not on oath) he mentions all six prisoners 1 to 6, as being of those who attacked him; on his sworn testimony being recorded the next day, he excludes the two principals from the charge. The omission is singular, doubtless; but I am not disposed to lay much stress on it, certainly not to go the length of the prisoners' Counsel, who looks upon it as an attempt to avoid the consequences of giving false evidence.

Messrs. Savi and Abbott, as I mentioned before, implicate none of the prisoners.

The witness Juggo Biswas alleges that he was behind the *sahebs;* that another Factory servant, Kurrum, was in front when the attack was made—(this by the way is distinctly opposed to the other evidence which makes the two servants precede the Europeans). He deposes to the presence of the prisoners, Ramguttee, Issur, Hurree, Gobindo Chatterjee, Gobindo Doss, Ramchurn and Kurrum Sheikh; he alleges also that Mohesh called out '*mar mar*'; he states further that the prisoners, Ramguttee and Issur struck at Mr. Meares, the latter with a spear which wounded his horse. Kurum identified Ramgoti, Issur, Kurum Sheikh, Gobindo Doss and Bunwaree, and alleges that the man who assisted Savi after he had fallen from his horse was the prisoner Mohesh, and that he used the words "not this *saheb*, but Meares *saheb*, and also urged on the attack by calling out '*mar mar*'. This witness, I observe, is the only one who states that the man who assisted Savi was Mohesh, the only one who heard Mohesh use the words "not this *saheb*, &c., &c." Now as Kurum was, according to the testimony of all the witnesses, ahead of the party, it would seem strange that he, who was in the most unfavorable position of all for seeing what took place during the assault, should be the only man who saw Mohesh pick up Savi and save him from further violence. Neither Juggoo nor Kashishur, who were both (if their own statements are to be believed) behind, mentions the circumstances which, had it happened as stated by Kurrum, they could not possibly had failed to see. This man Kurum too, I observe, excuses himself for not having identified more of the lattials by saying that he was "too much afraid to notice more;" and yet he is the only man who identifies Mohesh amongst the assailants, and that too when Mohesh was behind him! The third witness Kashishur, the Factory teshildar, was the man who is said to have met Meares on the road and warned him not to go through the village. He states in his deposition that he turned back with the *saheb* and witnessed what hap-

pened. But that he did turn back, is not in the least substantiated; the other witnesses do not mention the circumstance, and neither Mr. Meares nor Mr. Savi, who heard the man's warning, says that Kashishur turned back with them, and was present at the assault. He, however, states that he indentified all the prisoners, heard Mohesh and Madhub calling out '*mar mar*,' and the others, whom he does not name, as helping on the attack.

These three witnesses, be it observed, all identify the same persons; they depose to the same circumstances (Savi's affair excepted); they are able to distinguish which of the rioters had spears and which *lattees*, to pick out the men who made each particular assault; and all this in the confusion, which would necessarily accompany an attack of men armed with deadly weapons, and from which each one of the assaulted party including Meares himself (who left his comrade helpless on the ground) was trying to escape as speedily as possible.

The assault is said to have taken place on a sudden; in a moment the *sahebs* and their party are surrounded by a mob of armed men; blows are struck and spears used; the assailed run for their lives and the whole affair is over in a few seconds (this is clearly proved), and yet these three witnesses can find time to identify no less than ten men—men who are running about and attacking different people in different parts of the field, and who happen most strangely to be all the servants or defendants of Mohesh; of the other rioters they could not identify one.

But to come to the general improbabilities in the evidence. Is it likely in the first place that, had Mohesh collected men for the purpose of asaulting Mr. Meares, he would have allowed Kashishur the tesildar to leave the village and warn him, especially when, if the prosecution evidence be true, the prisoner Hurree was sent forward as a sentinel to give notice of the enemy's approach? Is it likely that Mohesh would thus allow his plans to be defeated? Is it likely again that a man in Mohesh's position, an old Fouzdaree and Serishtadar, a crafty intriguer like all his tribe, would, supposing he had planned the attack, have shewn himself openly directing and encouraging it? Would he too have ordered it to take place immediately in front of his own house, a state of things in which no amount of false swearing could prove an *alibi?* Is it likely that he would detail for the service his own teshildars, khansamah, and cook? All the prisoners, with one exception, are Mohesh's servants and dependants—not merely ryots but personal servants.

Were the evidence for the prosecution stronger than it is, and not forgetting that the story for the defence is, in my judgment, absolutely false, still looking at this evidence in the light of Indian experience, I should never be able to convince myself that it was true. I have given careful and earnest thought to this case. I have read the evidence over and over again, and come to an unhesitating opinion that it is so improbable, so utterly opposed to all experience of native habits and customs, so irreconcilable with every possible deduction, that no conviction can safely be based upon it.

And it is impossible, in my opinion, to separate the prisoners, Nos. 3 to 10 from the Baboos. They are, as I said before, all of them (one perhaps excepted—I said *perhaps* for the record does not clearly show that he, too is not also a dependant) the Baboos employées and personal domestics. That they would or could have taken part in an attack like the one now under consideration without their master's permission, is not to be believed. If they are guilty Mohesh is guilty also If Mohesh is innocent, they are equally entitled to an acquittal.

For the above reasons, I would acquit all the prisoners.

But I think it right to say a few words on what I have above called the third hypothesis, inasmuch as, after the serious charge made by the prisoners against the Factory, it may be as well to record an opinion so far as the evidence enables me to do so as to what was the real nature of the attack upon Mr. Meares.

Now it is admitted that Mr. Meares was personally obnoxious to many people; that he had received threatening notices; that his own servants had told him that he ran the chance of being assaulted. He admits himself that he expected a difficulty on the morning of the occurrence, and was astonished at finding the fields intact. My opinion is that, had Mr. Meares gone to these fields an hour or two later, his prognostications would have been verified, and that he would have received there the beating he afterwards underwent in the village. It would seem to me that the ryots (I may observe here that Mohesh is no where said to have had any concern with the land in question) were determined to prevent the sowing of their fields with Indigo, and to

sow another crop in them; and that they had collected at Doorgapore on the morning in question to carry out their plan—a plan Mr. Meares himself admits to have heard of,—and that Kashishur seeing their determination, and seeing also that his master was making his way towards the village, went out to try and turn him back. Mr. Meares naturally enough refused to be intimidated, went on, and was attacked, as stated, by the ryots who where opposed to his taking the fields in question for indigo.

There was no motive on Mohesh's part to make this attack. He had nothing to do with the lands; and though he might have been, and, no doubt, was not sorry to see his enemy's discomfiture, he would have taken very different steps to secure the same end. Had Mohesh determined to have Mr. Meares assaulted, the attack would have taken place far enough from his own village, and would have been carried out with the help of hired lattials, and not by the hands of his own servants.

This then was, in my opinion, the real cause of the assault, and I do not believe, nor is there any reliable evidence to support the fact, that it was, in any way abetted by Mohesh and Madhub, or carried out by any of the prisoners.

The 30th January 1865.

Present:

The Hon'ble F. B. Kemp, *Judge.*

Cheating, and false personation of Public Servant.

Queen *versus* Sadanund Doss *alias* Sona Biswas.

Committed by the Assistant Magistrate of Sub-Division Jaypore, and tried by the Sessions Judge of Cuttack, on a charge of Cheating, &c.

The prisoner, having passed himself off as a Police Officer, and cheated several villagers out of money, was held guilty of cheating and falsely personating a public servant.

THE prisoner has been convicted of cheating, Section 420 of the Indian Penal Code; and of personating a public servant, Section 170. The sentence passed is rigorous imprisonment for one year for each offence.

The prisoner pretending to hold the office of head Constable of Police, and under color of such pretended office, went to some of the villages in the Sub-division of Jaypore. The villagers were summoned and reprimanded as to the state of the roads; a small fee was extorted from several of the villagers; and the prisoner's gains would have been much more had it not been for the untimely arrival of the real Police Officer, who exposed the prisoner's assumed character.

There is ample evidence to prove that the prisoner, passing himself off as a Police Officer, cheated several of the villagers out of several sums of money. The act committed by the prisoner had relation to the office which he pretended to hold, for Police Officers are often deputed to enquire into matters of this description; the ryots were deceived and fraudulently induced to part with their money. The prisoner is, therefore, guilty of cheating and falsely personating a public servant.

I confirm the sentence, and reject this appeal.

The 30th January 1865.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Grievous Hurt—House Trespass.

Queen *versus* Bassoo Rannah.

Committed by the Deputy Magistrate of Sub-Division Khordah, and tried by the Sessions Judge of Cuttack, on a charge of Grievous Hurt, &c.

The prisoner entered a house for the purpose of committing an assault, and, in carrying out that intention, caused Grievous Hurt. In convicting and punishing him for the substantive offence (Grievous Hurt),—HELD that it was not necessary to pass a separate sentence for the offence of House Trespass.

Mr. Justice Kemp.—THIS prisoner has been convicted of two offences—*first*, voluntarily causing Grievous Hurt, Section 325 of the Indian Penal Code; and *second*, committing House Trespass in order to the committing of an offence punishable with imprisonment, Section 451.

It is clearly proved that the prisoner and another were squabbling with the husband and son of the witness Musst. Mookta, at the door of the house. This witness from inside remonstrated and abused the prisoner; the prisoner then went inside the house, pulled the witness out by the hair of her head, threw her down, and stamped upon her chest and abdomen. The woman was 17 days in hospital, during three days of which the Medical Officer deposes that her life was in danger. The woman alleges that the injuries she received caused a miscarriage; but this is not clearly established. As the life of the woman was endangered, the hurt comes under the eighth head of the hurts which are described as grievous, and the sentence passed under Section 325 may stand; but I think the sentence of imprisonment for six months in addition, awarded under Section 451, should be remitted. The prisoner has been convicted and punished of the substantive offence. The mere entering the house for the purpose of carrying out his intention of assaulting the woman, does not appear to me to call for a separate sentence. The papers must be submitted to Mr. Justice Glover.

Mr. Justice Glover.—I concur.

The 3rd February 1865.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Forgery—Committal.

Queen *versus* Dwarkanath Bose.

Committed by the Deputy Magistrate of Jehanabad, and tried by the Sessions Judge of Hooghly, on a charge of Forgery.

A Deputy Magistrate cannot commit a person for Forgery under Section 170 of the Code of Criminal Procedure, when the Civil Court has sanctioned the prisoner's committal under Section 169, unless with the express sanction of that Court.

THIS case has been referred to this Court under the following circumstances:—

Certain parties, defendants in a Civil suit, pleaded in their answer that the money claimed by the plaintiff had been paid by their father, and in support of their assertion produced a receipt. The Principal Sudder Ameen, before whom this case went in appeal, held that the receipt was a forgery, and gave the plaintiff permission to institute a Criminal charge against the defendant under Section 169 of the Code of Criminal Procedure.

This Section refers to offences against Public Justice described in Sections 193 to 196, 199, 200, 205, 211, and 228.

The Deputy Magistrate committed the prisoners to the Sessions under Sections 467 and 471 of the Penal Code, referable to Section 170 of the Code of Criminal Procedure.

The Judge holds that the Deputy Magistrate had no right to make this commitment, the Civil Court having only sanctioned a commitment under Section 169 and not under Section 170.

We think that the commitment must be annulled. The Civil Court gave its sanction to the defendants being charged with an offence referable to Section 169 of the Code of Criminal Procedure. The Deputy Magistrate, instead of carrying out these instructions, committed the parties under Sections 467 and 471 of the Code, which are referable (Section 407 including Section 463) to Section 170 of the Code of Criminal Procedure, for which he had no sanction.

Supposing the facts of this case to be true, no doubt the defendant might have been convicted under either of these Sections; but as the Civil Court chose to sanction a committal under one of them only, the Deputy Magistrate, we conceive, was not authorized to commit the case under the other.

We, therefore, quash his commitment, and direct him to recommit the parties in accordance with the sanction already given by the Civil Court, or if he think necessary to apply to that Court under Section 170.

The 3rd February 1865.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Award of possession under Section 318 of the Code of Criminal Procedure.

Queen *versus* Runjeet Molla.

Committed by the Officiating Joint Magistrate, and tried by the Sessions Judge of Rajshahye, on a charge of Criminal Trespass.

A Joint Magistrate cannot award possession under Section 318 of the Code of Criminal Procedure without making a formal enquiry.

THE only point on which this reference is made to the Court is, whether the Joint Magistrate was justified in awarding possession to Durbaso under Section 318 of the Code of Criminal Procedure without making the formal enquiry prescribed by law.

We think that he was not justified, but was bound, under the Section above quoted, to record a proceeding, stating his grounds for being satisfied that a breach of the peace was likely to occur in consequence of the dispute, and then to call upon the parties concerned to attend and prove the fact of their actual possession.

This the Joint Magistrate did not do, but decided the question of possession in Durbaso's favor without the previous enquiry which the law holds to be necessary.

We, therefore, annul his order, and direct him to adjudicate the question of possession in a regular manner under Section 318, should circumstances render it in his opinion still necessary to do so.

The 3rd February 1865.

Present:

The Hon'ble F. B. Kemp and F. A. Glover,
Judges.

Grievous Hurt (Punishment for).

Queen *versus* Sharoda Peshagur and Prosunno Peshagur.

Tried by the Officiating Sessions Judge of Jessore on a charge of voluntarily causing Grievous Hurt.

The offence of voluntarily causing Grievous Hurt is punishable, not by fine alone, but by imprisonment, the offender being also liable to fine.

THE sentence of fine upon these prisoners by the Sessions Judge of Jessore is illegal.

The prisoners have been convicted of voluntarily causing grievous hurt. The punishment for such an offence is imprisonment of either description for a term which may extend to seven years *and* a fine, not *or* a fine (*see* Section 325 of the Indian Penal Code). Acting as a Court of Revision under Section 405 of the Code of Criminal Procedure, we annul the sentence passed by the Sessions Judge.

It appears that the two prisoners and the injured woman are prostitutes, the three got drunk together and then quarrelled. The witness, Jugut Mohinee, was beaten by the two prisoners; they also stamped upon her chest and abdomen. The Medical Officer deposes that the woman suffered much pain, and was so much injured in the abdomen that her life was despired of; the offence falls within Heading 8th Section 325 of the Indian Penal Code, and we pass a sentence of one year's rigorous imprisonment on each of the prisoners.

The 3rd February 1865.

Present:

The Hon'ble F. B. Kemp and F. A. Glover,
Judges.

Order of Magistrate for removal and reconstruction of roof-drains—Public Nuisances.

Queen *versus* Shabuckram Bukoolee and another.

Committed by the Deputy Magistrate, and tried by the Sessions Judge of Hooghly, on a charge of Disobedience of Orders.

Before a person can be legally punished for refusal to remove and re-construct roof-drains, evidence ought to be taken whether the party has disobeyed the Magistrate's order, and that such disobedience has produced, or is likely to produce, harm.

Quære.—Whether such an order under Section 73 of the Code of Criminal Procedure is legal, as that Section refers to Public Nuisances.

THIS case has been referred under the provisions of Section 434 of the Code of Criminal Procedure by the Sessions Judge of Hooghly.

It appears that the plaintiff obtained an order from the Magistrate enjoining the opposite party not to repeat or continue a public nuisance under Section 63 of the Code of Criminal Procedure. This order was passed on 6th September 1862. The opposite party sued to set aside this order; but they were unsuccessful. In September 1864, the order was repeated, and the opposite party were directed to remove the roof-drains on the eastern side of their house, and to re-construct them in such a manner as not to injure or inconvenience any party.

The Deputy Magistrate, holding that the opposite party had been guilty of disobedience of this order, has fined them 10 Rupees, and, in default of payment, to ten day's simple imprisonment.

We think with the Judge that, before the opposite party could be legally punished, some evidence ought to have been taken that they have disobeyed the orders of the Magistrate, and that such disobedience produced, or was likely to produce harm (*See* Explanation to Section 158 of the Indian Penal Code). Now, we find that an Ameen was deputed to enquire into the matter; he submitted a report and sketch of the house; from his enquiries it is very clear that the opposite party have constructed *puckah* pipes down the side of their house through which the water from the roof passes into a small drain running along the side of the road, and that no injury is done to any body by this arrangement. We are also very doubtful whether the order under Section 63 was legal, inasmuch as that Section refers to public nuisances. In this case, there has at no time, been any objection, annoyance, or injury to the public.

We annul the sentence passed by the Deputy Magistrate, and direct that the fine be refunded to the opposite party.

The 3rd February 1865.

Present:

The Hon'ble F. B. Kemp and F. A. Glover,
Judges.

Attachment of land under Section 3 Act IV of 1840—Withdrawal of.

Queen *versus* Lalla Hurree Hur Pershad and others.

Committed by the Magistrate, and tried by the Sessions Judge of Beerbhoom, on a charge of Breach of the Peace.

An attachment of land under Section 3 Act IV of 1840, can only be withdrawn by the Officer who attached the property.

READ a reference from the Sessions Judge of Beerbhoom, dated 10th January 1865.

It appears that on the 31st May 1864, the Magistrate of Beerbhoom, under Section 4 Act IV of 1840, ordered an enquiry with regard to certain property in Deoghur, which was then a sub-division of the said District.

The Deputy Magistrate of Deoghur, within whose jurisdiction the property was situated, attached the lands under Section 3 of the aforesaid Act. It has now been decided by the High Court that the proprietary title is vested in Hoobnarain Singh, who applied to the Magistrate of Beerbhoom to withdraw the attachment, to put him into possession, and to direct the Collector to make over to him the mesne profits.

The Magistrate of Beerbhoom ordered the attachment to be withdrawn, and the collections to be refunded to Hoobnarain Singh.

The Judge holds that the order is illegal, inasmuch as the attaching officer was the Deputy Magistrate of Deoghur, which subdivision has since been incorporated with the Sonthal Pergunnahs; and, further, that the Magistrate of Beerbhoom has no jurisdiction.

We think that the Judge is right; the application must be made to the Deputy Magistrate of Deoghur, the officer who attached the property.

The 4th February 1865.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Murder (by supposed insane person).

Queen *versus* Arzao Bebee.

Committed by the Magistrate, and tried by the Sessions Judge of Chittagong, on a charge of Murder.

The prisoner was convicted of murder and sentenced to death. But before confirming the sentence, as doubts were entertained of her sanity, the case was referred to the Sessions Judge with instructions for further enquiry.

THE prisoner has been convicted of murder under Section 302 of the Indian Penal Code. The Sessions Judge of Chittagong has passed sentence of death, subject to the confirmation of this Court.

The prisoner pleaded guilty, both before the Magistrate and the Sessions Judge. This plea was recorded in the Sessions Court, and she was convicted without taking the evidence for the prosecution. This procedure was strictly legal under the provisions of Section 362 of the Code of Criminal Procedure.

We have read and considered the evidence before the Magistrate. The very peculiar circumstances attending the murder, taken with the fact that the prisoner was sent in by the Police, about a year before the occurrence of the present crime, as a person of unsound mind, induce us to hesitate passing any sentence at all, much less an irrevocable one, until we are fully satisfied that the prisoner was of sane mind, and consequently a responsible agent, when she committed the crime with which she is charged; and for the purpose of clearing up this doubt, we return the papers connected with the trial to the Sessions Judge. He is requested to examine the whole of the witnesses in the presence of the Civil Surgeon. That officer must be directed to visit and watch the prisoner for a period not less than one month, and to submit a report, which must be verified, of the result of the inquiries and observations. The Sessions Judge is at liberty to take any further evidence he may deem proper, with reference to the state of the prisoner's mind when she committed the crime with which she is charged. The whole of the evidence thus obtained, with the Judge's opinion, must be submitted for the final order of this Court.

The 6th February 1864.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Grievous Hurt (Punishment for).

Queen *versus* Menazoodin and Hefazoodin

Tried by the Sessions Judge of Jessore, on a charge of Grievous Hurt.

The offence of causing Grievous Hurt is punishable by imprisonment and fine, and not imprisonment or fine.

THESE prisoners were convicted by the Sessions Judge of Jessore of causing grievous hurt, Section 325 of the Indian Penal Code. The sentence passed was each to pay a fine of fifty Rupees, or, in default of payment, to suffer three months' rigorous imprisonment.

The proceedings of this case were called for by Mr. Justice Trevor, on a review of the Abstract Statement of Sessions trials.

The sentence is clearly illegal. The offence of causing grievous hurt is punishable by impisonment *and* fine, and not by imprisonment *or* fine. Under Section 405 of the Code of Criminal Procedure we reverse the sentence; and, taking into consideration the facts of the case, and the circumstance that the witness Sadhoolla's arm was factured, we sentence the prisoner to two years' rigorous imprisonment.

The 14th February 1865.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Adultery—Enticing or taking away married woman.

Queen *versus* Pochun Chung.

Committed by the Deputy Magistrate, and tried by the Sessions Judge of Sylhet, on a charge of Adultery, &c.

A person convicted of adultery under Section 497 of the Penal Code, need not be convicted also under Section 498; far less where there is no taking or enticing away of the woman.

Mr. Justice Glover.—THAT the prisoner committed adultery with the woman Hurree the wife of Gopaul, is, I consider, proved. The evidence is quite clear as to the woman's having gone to live with the prisoner; and from the prisoner's own statement to a number of persons who have deposed in this case that he had married Hurree, it may be fairly presumed, as stated by the witness Joba, that cohabitation took place as admitted by both parties to the Deputy Magistrate, though denied at the Sessions. But I do not think that it is either necessary or proper to convict the prisoner under both Section 497 and Section 498. The former provides for adultery of which he has been found guilty; the other for "enticing" for the purpose of illicit intercourse—a charge which, even if proved, would seem under the circumstances of the present case to be included in the more serious crime. I say "even if proved," because the woman herself declares that, being deserted by her husband, she went to the prisoner's house of her own accord.

I would, therefore, annul the conviction under Section 498.

And with reference to the circumstances detailed in evidence, the desertion of her husband, the desire of the prisoner to marry the woman, and the very loose way in which marriages are conducted amongst persons of the prisoner's caste, and which give a certain color of probability to his statement that he had married her without the intervention of a priest, I think that the sentence of two years' rigorous imprisonment is too severe. In apportioning punishment, we must take into consideration the *status* of the parties. The present offence which would be a serious one amongst educated people is reduced considerably by the fact that the accused is a low-caste half-savage barbarian, with scarce an idea that he has been doing wrong at all.

I would reduce the punishment to six months' rigorous imprisonment.

The papers must be laid before my colleague Mr. Justice Kemp.

Mr. Justice Kemp.—All the parties in this case are Chundals, the very lowest caste amongst the Hindoos.

The witness No. 1, Gokool, left his wife Hurree, and went to Cachar in search of service. The woman appears to have been wholly unprovided for. She went to the house of the prisoner of her own accord, and cohabited with him. It was given out to the neighbours and to men of the prisoner's caste that she was his wife. I do not find that the prisoner attempted to set up a marriage in his defence before the Sessions Judge. It is clearly proved that Hurree was married to the witness Gokool. It is also in my opinion established that the prisoner had sexual intercourse with Hurree, and that he knew that she was the wife of Gokool. There was no consent or connivance on the part of the husband; and as the charge was instituted on the part of the husband, the offence of adultery is made out against the prisoner under Section 497. The Judge was certainly wrong in convicting under Section 498, for there was no taking or enticing away of the woman, and considering all the circumstances of the case, I think that the sentence proposed by my learned colleague is a proper one.

The 17th February 1865.

Present:

The Hon'ble C. B. Trevor and G. Loch, *Judges.*

Defamation—Low caste of prosecutor.

Queen *versus* Nobin Dome, &c.

Committed by the Deputy Magistrate, and tried by the Sessions Judge of Beerbhoom, on a charge of Defamation.

A false accusation not made in good faith renders the party making it liable to be charged with defamation.

The fact that the complainant is a man of low caste, will not debar him from prosecuting for defamation on his being falsely charged with theft.

THE Deputy Magistrate's order, under Section 67 of the Code of Criminal Procedure, dismissing the complaint, is altogether erroneous. The prosecutor, says the Deputy Magistrate, is a low man, and the accusation was theft of a goat; and that such an accusation against such a man was a harm under Section 95 of the Penal Code and not an offence. The Deputy Magistrate has, therefore, dismissed the complaint under Section 67 of the Code of Criminal Procedure.

The false accusation was one against the moral character of the prosecutor, defamatory in its nature, and presumably made with knowledge and intent to harm or injure the prosecutor, and, unless shown to have been made in good faith, renders the party making it liable to be charged with the offence of defamation. The fact that the complainant was a low man, or a man of low caste, will certainly not debar him from prosecuting for defamation on his being falsely charged with theft, and the Court is surprised to find the Deputy Magistrate, who was formerly a Law Officer, ignorant of the elementary fact that all persons are equal in the eye of the Law. We remit the case to the Magistrate through the Judge for a full investigation of the case.

The 20th February 1865.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Nuisance—Obstruction of private path—Notice to opposite party.

Queen *versus* Janokenath Bhuttacharjee.

Committed by the Deputy Magistrate, and tried by the Sessions Judge of Tipperah, on a charge of Obstructing a thoroughfare.

The obstruction of a private path is not a nuisance under Section 308, Code of Criminal Procedure.

Before issue of order by a Deputy Magistrate for the removal of a nuisance, the opposite party should be called upon to show cause why the order should not be enforced.

THIS case has been referred by the Officiating Sessions Judge of Tipperah, as he is of opinion that the order of the Deputy Magistrate is illegal.

It appears that one Janokenath Bhuttacharjee complained that the path leading to and from his house, had been closed by the opposite party; he asked the Deputy Magistrate to interfere under Section 308 of the Code of Criminal Procedure. The Deputy Magistrate took the deposition of the complainant, and passed the following order—"Let an order be passed to enquire into the circumstances of this case; and further it is ordered that, if the path is really closed, it must be re-opened."

The Police acting on this order, and finding, as it is stated, that a mat fence had been placed across the path, removed the obstruction.

The opposite party appealed to the Judge who has submitted the proceedings under Section 434 of Act XXV of 1861, being of opinion that the Deputy Magistrate's order is illegal as no notice was issued upon the opposite party to show cause why the order should not be enforced.

The nuisance complained of in this instance does not come under Section 308 at all, for the path, which the plaintiff wishes to have opened, is not a thoroughfare or public place, but a private path leading from the house of the plaintiff to the main village thoroughfare. The Deputy Magistrate therefore was altogether wrong in proceeding under this Section. We reverse his order. The plaintiff must seek his remedy in the Civil Court.

The 22nd February 1865.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Defamation (No distinction between written and spoken).

Queen *versus* Mohunt Pursoram Doss.

Committed by the Joint Magistrate, and tried by the Sessions Judge of Tirhoot, on a charge of Defamation.

The Penal Code makes no distinction between written and spoken defamation.

ON the motion of Mr. Allan, pleader for the prisoner, and as the case was a novel one, we called for the record of the trial under the provisions of Section 405 of the Code of Criminal Procedure, for the purpose of satisfying ourselves as to the legality of the conviction and sentence. It appears that Mr. McIver, a Tirhoot Indigo Planter, charged the prisoner and others with the offence of riot. The Judge, while he admitted the *factum* of the riot, doubted the evi-

dence in the matter of the identification of the prisoner and his dependants, and acquitted them. In the course of the preliminary enquiries into the said case, conducted by the Police, the prisoner made use of certain words with reference to Mr. McIver, which, on the prosecution by that gentleman under the provisions of Section 500, have been held by the Magistrate and the Sessions Judge in appeal to amount to defamation as defined in the Indian Penal Code. The sentence passed on the prisoner is six months' simple imprisonment, and a fine of rupees 100; in default of payment of the fine, further imprisonment for three months.

The words used were in reply to a remark by the Sub-Inspector who enquired into the riot case. That officer observed that Mr. McIver would hardly have brought a false charge against the prisoner. The prisoner then made use of the following language—"He (*i. e.* Mr. McIver) has burnt down ten villages in the Factory from which he has come, and he will do the same here." The prisoner, though he denies making use of these precise words, admits that he said—"When you were at Ilmusnugger, you burnt the refuse of the Indigo stalks, and then accused Mirian Khan and others of having done so."

The Judge finds that he made use of the first speech, but for the sake of argument observes that even taking the speech to have been as admitted by the prisoner, the offence of defamation was equally made out. and there can, we think, be no doubt that both speeches are defamatory. As the sentence, though perhaps severe, is not illegal. the Court has only to consider whether the conviction is legal or not.

Defamation, as defined by the Penal Code, consists in an injury to the reputation; and no distinction is made between written and spoken defamation. Mr. McIver has lately commenced Indigo speculations in Tirhoot, and at the time the defamatory words were used, he was building a Factory. It is very clear that such a speech in the presence of a large assembly of ryots, who were concerned either as witnesses or parties to the alleged case of riot, was calculated to injure Mr. McIver's reputation as an Indigo Planter; and further, the prisoner must have well known that his defamatory speech was likely to injure that gentleman's reputation. The imputation was not made in good faith, nor was it necessary for the protection of the interests of the party making it. It does not, therefore, fall under the 9th exception to Section 499 of the Penal Code.

Mr. Allan contends that the principal witness, the Sub-Inspector, before whom the words were used, has not been examined, and that, as he could give the best evidence as to the very words used, no conviction can be had in his absence. But we find that the Judge was satisfied, by the evidence of Mr. McIver and the other witnesses, of the words which were spoken by the prisoner; and as this is a legal finding on evidence, we cannot interfere.

The offence being defamation within the meaning of that offence as laid down in Section 499 of the Indian Penal Code, and the sentence under Section 500 being a legal one, we see no reason to exercise any of the powers of revision vested in us by the Code of Criminal Procedure.

The conviction and sentence must stand.

The 6th March 1865.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Dacoity with Murder.

Queen *versus* Ruchee Ahen.

Committed by the Joint Magistrate, and tried by the Sessions Judge of Shahabad, on a charge of Murder, &c.

When murder is committed in the commission of a dacoity, every one of the persons concerned in the dacoity is liable to be punished with death.

Mr. Justice Kemp.—THE prisoner was arraigned on four charges: 1*st*, Murder, 2*nd*, Culpable Homicide not amounting to murder, 3*rd*, Dacoity, 4*th*, Riot.

He pleaded not guilty. The Judge has convicted the prisoner of the offence of Dacoity, and has sentenced him to be transported for life.

It is clearly proved that the prisoner and others at night attacked the Kelyan of the witness Patul Kooree since deceased, for the purpose of robbing the grain. Patul Kooree seized the prisoner who shouted out to his companions that he had been captured. The prisoner managed to get away from the grasp of the witness Patul Kooree. The prisoner then struck the witness a blow on the head with a club to which an iron head in the shape of an elongated axe was attached.

The prisoner and the other dacoits then made off, carrying with them some grain.

The witness Patul Kooree was sent to the Hospital, and died there from the effects of the injury received on the head.

The Judge observes that he does not consider it necessary to go into the question as to whether any act of Culpable Homicide amounting or not amounting to murder has been committed by the prisoner, inasmuch as the punishment for dacoity meets any sentence to which the prisoner might be liable on the graver charge, with the exception of a capital sentence which the circumstances of this case did not, in the Judge's opinion, appear to be called for.

I think that the Judge is wrong, and that he ought to have enquired into the question, inasmuch as, if murder was committed in committing a dacoity, every one of the persons committing such offence might be liable to be punished with death.

It appears to me that the prisoner has been clearly guilty of the offence of murder committed in the commission of the offence of dacoity. The prisoner had got away from the grasp of the witness; and his using his *lattee* and striking the witness on the head, evinces an intention to take life. I am, therefore, of opinion that the prisoner should have been convicted under Section 396 of Dacoity with Murder. With the sentence I cannot interfere. It is certainly not too severe under the circumstances of the case. The papers must be laid before my learned colleague Mr. Justice Glover.

Mr. Justice Glover.—I entirely concur.

The 8th March 1865.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Culpable Homicide not amounting to murder—Grievous Hurt.

Queen *versus* Megha Meeah *alias* Juckon Meeah.

Committed by the Assistant Commissioner, and tried by the Deputy Commissioner of Cachar, on a charge of Culpable Homicide not amounting to murder, and Escape from Lawful Custody,

When there is neither intention, knowledge, nor likelihood that the injury inflicted in an assault will or can cause death, the offence is not Culpable Homicide not amounting to murder, but Grievous Hurt.

Mr. Justice Glover.—THAT the prisoner struck the blow which caused the deceased's death is clearly proved by the evidence; but the offence, as found by the Sessions Judge, is not Culpable Homicide not amounting to murder, but Grievous Hurt.

It is proved, and admitted by the Sessions Judge, that the prisoner received provocation at the hands of the deceased, and that the weapon he used, in retaliating, was a light bamboo stick, not more than an inch in diameter, and that the blow was aimed not at the head but at the side. It unfortunately happened that the deceased was suffering from diseased spleen; and a very

slight blow on the region of that organ would have been, in the opinion of the Medical Officer, sufficient to cause death.

Culpable Homicide not amounting to murder supposes that the party, inflicting the injury, does it either with the intention that it should cause death, or with the knowledge that it may do so, and the offence is modified from murder (which it would be if the above-mentioned knowledge or intention were proved) by the existence of certain exceptions noted under Section 300 of the Penal Code.

When there is neither intention, knowledge, nor likelihood that the injury inflicted will or can cause death, the offence would be "voluntarily causing grievous hurt" under Section 322, or that, under the old law, would have been termed, "manslaughter." As the prisoner evidently neither intended the blow struck on the deceased's side to be fatal, nor supposed that it was likely to be fatal, this conviction would have been under Section 322 and not under Section 300.

And, under the circumstances, I consider a sentence of 3 years' rigorous imprisonment for such an assault too severe. I would reduce it to one, and that, with the additional year which the prisoner has to undergo for attempting to escape, will be a sufficient punishment.

The case must be laid before Mr. Justice Kemp.

Mr. Justice Kemp.—I concur. There was clearly no intention to cause death or to cause such bodily injury as was likely to cause death, nor was there any knowledge on the part of the prisoner that his act was likely to cause death. The offence of which the prisoner is guilty is voluntarily causing grievous hurt. The sentence proposed by my learned colleague has my concurrence.

The 14th March 1865.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Abetment of Theft.

Queen *versus* Shumeeruddeen and others.

Committed by the Magistrate, and tried by the Sessions Judge of Backergunge.

A person can be convicted of abetment of theft under the 1st Explanation of Section 107 of the Indian Penal Code, only if he either procures or attempts to procure the commission of the theft. Mere subsequent knowledge of the offence is insufficient.

THE prisoners, Nos. 153, 154, and 155, Sonaullah, Sulleem and Meerkhan, have been convicted of theft—the prisoner, No. 152, Shumeeruddeen, under Section 109 of the Indian Penal Code, of abetment of theft by a servant, under Section 381 of the Indian Penal Code, and also, under Section 201 of the Code, of causing the disappearance of evidence of an offence which he knew to have been committed.

With regard to the three first named prisoners, we see no reason to interfere. They confessed their guilt before the Magistrate, and the stolen money was found in their possession.

The conviction of Shumeeruddeen, however, we consider bad on both counts.

The Sessions Judge considers the offence of abetment proved against the prisoner under the 1st Explanation of Section 107 of the Indian Penal Code. But here, we observe, he is clearly mistaken. That explanation, states that any one who, by misrepresentation, &c., &c., "procures or attempts to procure a thing to be done," but there is no question that Shumeeruddeen did not procure or attempt to procure the theft to be committed. He only knew of it some days after Aktaruddeen's death, and then there was nothing more than suspicion against the prisoners Sonaullah, Sulleem, and Meerkhan. They had not then confessed nor had any of the missing property been found in their possession. They did not confess till a long time afterwards when the Police came to make enquiries. We do not, moreover, consider that Shumeeruddeen was in a position that would bind him to take the initiative in informing the Police. His master Afsurdeen, Aktaruddeen's elder brother, was in the house managing the deceased's affairs; and it was for him to give notice to the authorities if he considered that a theft had been committed. The prisoner, as naib, was his servant, and under his orders.

The Section on which the Judge has relied, will not, therefore, fit the present case. Nor do we think that Shumeeruddeen can in any way be held responsible as regards the alleged theft.

The second charge appears equally untenable. There is no reliable evidence to shew that the prisoner caused the memorandum (supposing it to be proof of the theft, from the strong box), found in Aktaruddeen's bed after his death, to be made away with. The

witnesses depose generally that, as naib, he ordered the paper to be taken care of, and kept in the serishta of the zemindaree; and because it cannot now be found, the Sessions Judge presumes that Shumeeruddeen made away with it.

But why should he have done so? What possible object could he have had? The memorandum did not implicate him in any way; nor was he in the least degree interested in its disappearance. On the contrary, as he had himself accused one of the body servants of the deceased Aktaruddeen of having taken part in theft, his object would have been to preserve the paper as a means of proving that, before Aktaruddeen's death, the box had contained so much more money than was found in it afterwards.

That there are many very suspicious circumstances in this case regarding the death of Aktaruddeen, we readily admit; and it may be, as is alleged by the witnesses generally, that Shumeeruddeen was not an honest man, and had misappropriated his employer's funds. But in this particular instance there is neither proof nor presumption against him, and we are clearly of opinion that he must be released.

The 15th March 1865.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Right of private defence of property—Causing disappearance of evidence.

Queen *versus* Pelko Nushyo and others.

Committed by the Magistrate, and tried by the Sessions Judge of Rungpore, on a charge of Culpable Homicide, &c.

A commits no offence, if in exercising the right of private defence of his property against B, whom he finds near a hole in A's house, and on being attacked by B, he strikes a blow at random, and in the dark with a stick in his hand, whereby B is killed. C and D, by assisting A in removing the body of B, cannot be convicted (under Section 201 of the Penal Code) of having caused evidence to disappear, they having no knowledge or belief that an offence had been committed, nor any intention of screening an offender.

THESE three prisoners, who are near relations, were committed to take their trial before the Sessions Judge of Rungpore on the following charges:—

Against Pelkoo Nushyo.—1*st.* That he committed Culpable Homicide by causing the death of Kandooram, Section 304 of the Indian Penal Code.

2*nd.* That he caused the disappearance of evidence, knowing that an offence had been committed, by concealing the body of Kandooram, Section 201 of the Indian Penal Code.

Against Ram Mahomed and *Mokur Nushyo.* The offence under Section 201 of the Indian Penal Code.

The Sessions Judge finds the prisoner Pelkoo guilty of culpable homicide, and the prisioners Ram Mahomed and Mokur Nushyo guilty of an offence under Section 201 of the Indian Penal Code. Sentence each to be rigorously imprisoned for one year.

The Judge in the English Department, Mr. Justice Trevor, called for the papers of the case to satisfy himself of the propriety of the sentence.

The papers have come before this Bench.

The Judge, from his remarks and from the lightness of the sentence, doubtless intended to convict the prisoner Pelkoo of Culpable Homicide not amounting to murder. He has, however, found him guilty of Culpable Homicide, which may include the offence of murder, unless the offence be qualified by some one of the exceptions stated in Section 300 of the Indian Penal Code, and none are stated in the calendar. The Judge admits that a burglary was committed in the house of the prisoner Pelkoo, by the deceased and another party who has not been arrested; he also admits that there is no evidence as to how the deceased met with his death beyond the admission of the prisoner Pelkoo; but he observes that, by the removal of the body, the prisoner has caused to disappear evidence which might have told for or against him—in his favor for instance, if the medical evidence had shewn that the deceased died from rupture of the spleen—against him, if the same evidence proved that the deceased had been more cruelly treated than the fact of his being caught in the act of committing a burglary warranted. The Judge convicts the prisoner Pelkoo of Culpable Homicide alone and the two other prisoners under Section 201.

We have read the statement of the prisoner Pelkoo; and as there is no evidence against him beyond his own admissions, which must be taken in their entirety, we are of opinion that he is guilty of no offence.

The prisoner states that a burglary was committed in his house (this fact is admitted by the Judge); that, on his coming out of his house with a stick in his hand, he saw two men close to the aperture made in the *tatee*—one of these men made off—the other, the deceased, advanced to attack the prisoner, when the latter struck at him in the dark, but is unable to say on what part of the body of the deceased the blow fell; that, on calling out, his uncle and nephew, the prisoners Ram Mahomed and Mokur, came up; that, when they lit a lamp, they found that the man who had been struck by the prisoner Pelkoo, was dead; that from fear of a visit from the Police they removed the body, and left it in a sugar-cane field about a mile from the house of the prisoner Pelkoo. Taking these admissions as our guide, we are of opinion that the prisioner Pelkoo was exercising the right of private

defence of his property from house-breaking by night. The right of private defence commenced when a reasonable apprehension of danger to the property commenced. Now, it must be admitted that, when a man finds another close to a hole which has been burglariously cut in his house, and further, when that man is attacked by the other party, a reasonable apprehension of danger to the property of the prisoner so attacked existed, such as to justify that person exercising his right of private defence of his property. There was no time to have recourse to the protection of the public authorities. Nor, taking the admission of the prisoner (and there is no evidence beyond these admissions), can it be said that more injury was inflicted than was necessary for the purpose of private defence, for the prisioner states that he struck one blow at *random*, and in the dark? As, therefore, the prisoner Pelkoo has been guilty of no offence under Section 304, he must be acquitted. He has not been convicted under Section 201.

With reference to the other prisoners who have been convicted under Section 201, we observe that the Section contemplates a knowledge or a reasonable belief that an offence has been committed, and an intention to screen the offender. Now, as we have held that the prisoner Pelkoo was guilty of no offence, it may be presumed that the other prisoners could not have had any knowledge or belief that an offence had been committed, nor any intention of screening an offender. It was doubtless wrong to remove the body, but the act was under the circumstances a natural one, and was, in our opinion, caused by the dread which the people at large entertain, and not altogether without reason, of a Police inquisition. We acquit all the prisoners, and direct their immediate release.

The 15th March 1865.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Enquiry (Definition of)—Breach of the public peace—Possession.

Queen *versus* Soonacollah.

Referred under Section 434 *Act* XXV *of* 1861.

Taking the statements of both parties without recording evidence in proof of either, is not an "enquiry."

No enquiry should be made, nor order giving possession to one side or the other passed under Section 318 of the Code of Criminal Procedure save on the supposition that the dispute is likely to cause a breach of the peace.

WE think that the Deputy Magistrate did hold that Munnoo was the party in possession, although, as he appears to have taken only the statements of both parties without recording evidence in proof of either, his proceedings, as the Judge remarks, cannot be called an "enquiry."

And we agree with the Judge that no such enquiry should have been made, and no order giving possession either to one side or the other should have been passed under Section 318 of the Code of Criminal Procedure save on the supposition that the dispute was likely to cause a breach of the peace.

As there was no such likelihood in the present case, the Deputy Magistrate's order was illegal and should be cancelled.

The 15th March 1865.

Present:

The Hon'ble F. B. Kemp, *Judge.*

Commitment by Sessions Judge (of accused person discharged by Magistrate).

Queen *versus* Sheetaram Chowdry.

Committed by the Assistant Magistrate, and tried by the Sessions Judge of Tirhoot, on a charge of Culpable Homicide, &c. &c.

A Sessions Judge has discretion to order the commitment to the Court of Sessions of any accused person discharged by the Magistrate. The non-exercise of such direction cannot be interfered with by the High Court.

THE explanation of the Sessions Judge has been considered. It appears to be sufficient and satisfactory. Under Section 435 of the Code of Criminal Procedure, the Sessions Judge has a discretion to order the commitment to the Court of Sessions of any accused person who may have been discharged by the Magistrate. The Sessions Judge in this case did not think it right to exercise the discretion, and this Court cannot interfere.

The 15th March 1865.

Present:

The Hon'ble F. A. Glover, *Judge.*

False and malicious charges (made officially by subordinates) - Recusant witnesses.

The Queen *versus* Rhedoy Nauth Biswas.

Committed by the Deputy Magistrate, and tried by the Sessions Judge of Hooghly, on a charge of instituting False Criminal proceedings in order to injure.

The mere fact of being in a subordinate position will not hold a man for the consequences of false and malicious charges made by him officially.

Where a recusant witness does not make his appearance the Magistrate may sell any part of the attached property and recover the amount of fine imposed on him. The fine is not illegal by reason of the witness' answers to the charge not having been recorded.

THIS appeal is preferred on the ground of misdirection.

The prisoner is or rather was a head Constable of Police stationed at Bally, and on the 27th June and 6th of August last, respectively, sent in reports to his immediate superiors that Kummul Ram and Mochee Ram were in the habit of dealing in stolen goods. The result of these reports was a Criminal information before the Deputy Magistrate who, however, acquitted Kummul Ram and Mochee Ram, and sent up their accuser to the Sessions, under Section 211 of the Indian Penal Code. The Jury found the prisoner guilty.

It is urged in appeal that the prisoner was a Subordinate Police Officer, and acted in obedience to superior orders, and ought not to be held responsible.

On this, I observe that the Criminal information was laid before the Deputy Magistrate entirely on the prisoner's representation to his Inspector. Had it not been for his reports to that official, the charge would never have been made; and the prisoner, although a subordinate to all intents and purposes, was the actual and personal originator of the charge, and cannot shift the responsibility. I think that the Judge was right in looking to the prisoner alone. If the mere fact of being in a subordinate position, is to shield a man from the consequences of official acts originated by himself, no one will be safe from false and malicious charges.

For the rest, the Judge placed all the points of the case very clearly and fairly before the Jury; and they held that the charges were intentionally false, and that there was no ground for the proceedings against the mahajuns.

The only point of law raised in the prisoner's favor is the one noted above, and that being given against him there is no ground of appeal. The appeal is, therefore, rejected.

I notice, in connection with this case, the Sessions Judge's proceedings in the appeal of Ram Koomar Holdar, a recusant witness, who, in spite of summons, proclamation, and attachment of property, refused to appear and give evidence. The Deputy Magistrate punished this man with a fine of 100 Rupees; but the Judge reversed this order, on the ground that the appellant's answers to the charge ought to have been recorded, and not being so recorded, the fine was illegal. This seems to me a mistaken view of the law. Section 190 of the Code of Criminal Procedure provides that in cases where a recusant witness does *not* appear, the Magistrate may sell any part of the attached property, and thereby recover the amount of any fine that the Magistrate may impose. Taking a witness's answer supposes that the man makes his appearance; but in the present case, Ram Koomar did not come in, and his defence could not have been taken. The Deputy Magistrate's order was, in my opinion, prefectly legal.

The 20th March 1865.

Present:

The Hon'ble F. A. Glover, *Judge.*

False Evidence.

Queen *versus* Echan Meeah and others.

Committed by the Magistrate, and tried by the Deputy Commissioner of Cachar, on a charge of Perjury.

The making of a false statement without knowledge as to whether the subject matter of the Statement is false or not, is legally a giving of false evidence.

THE appellants in this case (who give no reasons for questioning the Deputy Commissioner's judgment) have been convicted of intentionally giving false evidence in a judicial proceeding (Section 193 of the Indian Penal Code) under the following circumstances.

One Mahomed Alee had a long standing feud with the prisoners, which was the cause of various complaints preferred by either party in the Criminal Court of the District. It culminated in the prisoner Echan Meeah appearing one day at the thannah, where he accused Mahomed Alee of burglary and theft. The Police investigated the case and found in Mahomed Alee's house a cloth, thal, two cups *(kuttoras)* and a pair of tars, which Echan and his witnesses swore to before the Magistrate as being his (Echan's) property stolen from his house at the time of the burglary. The Police, I may remark, held the charge to be false; but Echan insisted on the case being sent to the Magistrate, when he and his witnesses deposed as above mentioned.

The Magistrate considered the charge false, and committed all the parties to it for perjury.

The Deputy Commissioner convicted them, and sentenced Echan Meeah, the principal, to seven years' rigorous imprisonment, and his witnesses to four years each.

I see no reason to interfere. With regard to the cloth, the dhobee who washed it, has deposed that he was in the habit of marking the clothes of each of his customers with a private mark, and that Mahomed Alee's clothes had one of these marks; that the cloth in question bore Mahomed Alee's mark as did (a fact proved by actual inspection) the other clothes which were found on Mahomed Alee's person, and which were confessedly his property. Echan's clothes were marked in a different manner as was found by inspecting the clothes he were in Court.

The tars are proved to belong to Mahomed Alee by the man who manufactured them.

The cups, dish, and dhao, which were found in Mahomed Alee's house, are proved to belong to him; and the evidence for the defence in this particular is utterly inconsistent and worthless: as to the tars and cloth, the defence witnesses ignored them altogether.

It is amply proved that all the articles claimed by Echan Meeah, belong to Mahomed Alee, and, under the peculiar circumstances of this case, there can be no doubt that Echan Meeah, in swearing to them as his own property, intentionally gave false testimony.

With regard to the other prisoners, they made the false statement, having, in all probability, no knowledge whatever on the subject one way or the other—still their offence is equally a giving of false evidence under the law—as they could not have believed what they deposed to be true.

I reject the appeals of all three prisoners, and confirm the sentences passed on them by the Sessions Judge.

The 20th March 1865.

Present:

The Hon'ble E. Jackson and F. A. Glover, *Judges.*

Decision without evidence, illegal.

Queen *versus* Sheik Edoo.

Reference under Section 434 of the Code of Criminal Procedure on a charge of Theft.

Case quashed as decided contrary to law on the unsupported statements of prosecutor and prisoner, without recording the evidence offered on either side.

THIS was a reference under Section 434 of the Code of Criminal Procedure by the Sessions Judge of Sylhet, transmitting certain proceedings of the Deputy Magistrate of that District, with his opinion that those proceedings were illegal.

It appears from the record that a boy named Sheik Edoo was charged by the prosecutor, Mr. Hellen, through his servant Mahomed Nazir, with the theft of two coats, and four other men, whose names were given, with the forcible rescue of the boy Edoo after has arrest by the prosecutor's servant.

The Deputy Magistrate, after some delay which is not explained on the face of the proceedings, took up the case, recorded the deposition of one Mahomed Nazir who appeared to conduct the prosecution, and the defence of the boy Edoo, and considering, for reasons given, the story to be improbable and false, discharged the latter from custody.

The proceedings of the Deputy Magistrate appear to us clearly illegal. He ought to have conducted the trial in accordance with Section 250 of the Code of Criminal Procedure. Instead of that, he took upon himself to discharge the prisoner Edoo, because he thought the circumstances of the case improbable without recording the evidence (that of no less than four witnesses) adduced by the prosecutor in support of his charge. It is not necessary for us to take into consideration the Deputy Magistrate's reasons, for, however valid they might be under different circumstances, and after the requirements of the law had been complied with, they are, as the case stands, based on nothing that can be legally considered as ground for a decision, and are consequently worthless.

To decide a case on the unsupported statements of prosecutor and prisoner, without recording the evidence offered on either side, is, in our opinion, a clear error in law; and, under Section 404 of the Code of Criminal Procedure, we quash the Deputy Magistrate's proceedings, and direct him to take up the case *de novo*, passing such order thereupon as may appear just and proper in accordance with the evidence.

The 20th March 1865.

Present:

The Hon'ble E. Jackson and F. A. Glover, *Judges.*

Evidence—Grievous Hurt.

Queen *versus* Nonkoo Doss and others.

Committed by the Deputy Magistrate of Durbunga Sub-Division, and tried by the Sessions Judge of Tirhoot, on a charge of Grievous Hurt.

Evidence to support a charge of Grievous Hurt.

Mr. Justice Glover.—THIS conviction appears to me bad. The prisoners are charged with having voluntarily caused grievous hurt to a person unknown, under the following circumstances:—

The deceased was, according to the evidence, which I see no reason to disbelieve, caught in the act of theft, and was being beaten and cuffed by all the prisoners, when one of the witnesses for the prosecution threatened to call the chowkeedar, on which they released their captive who went his way.

The next day he is said to have been found lying in a half-stupified state under a mangoe tope; on being questioned, however, he appears to have got up and walked off. The next day he is found dead in a nullah, which contained, at the spot where the body was found, from one to two feet of water.

The medical report states that the deceased's organs were all healthy, that there were some slight abrasions on the body, and that death was caused by drowning.

This statement is opposed to the evidence, which states that there were a number of marks and scratches on the deceased's body, together with the mark of a blow or kick on the private parts.

Now, in all this I can find no evidence on which to convict the prisoners of voluntarily causing grievous hurt. There is no proof whatever that the man died from the beating, and the fact of there being only a foot or so of water in the place where the corpse was found is no proof that the deceased was so weak that such a small quantity of water would have drowned him, for manifestly he might have fallen in at some other spot where the water was deeper, and have been carried off to where he was afterwards found by the strength of the current.

All suppositions or presumptions consequent on the man's body being found drowned must be put aside, and we must look solely to the nature of the original assault, and see whether it was of a nature to cause grievous hurt.

I do not think that it was. The evidence shews that the man was only cuffed and thumped with hand and fist; that he was on his feet at the time, and not knocked down or jumped upon, and the beating could not have been long continued as the villagers would have interfered, as indeed they did directly they heard of what was being done. Had the deceased been much injured, moreover, he could not have walked away either

on that day or on the succeeding one when he was found under the mangoe tope.

Had the medical officer been examined on oath, as he ought to have been, all doubt as to the manner of the man's death could have been legally set at rest. As it is, the Doctor's written note of the case is not evidence.

I agree with the Assessors that the offence proved against the prisoners, amounts to hurt only, and think that they should be sentenced each to simple imprisonment for four months, with a fine of 20 Rupees.

The papers must be laid before another Judge.

Mr. Justice E. Jackson.—I agree with Mr. Justice Glover and the Assessors that the evidence does not prove that the defendants were guilty of the crime of causing grievous hurt, and I concur in the reduction of the punishment which he recommends on conviction of the offence of causing hurt.

The 21st March 1865.

Present:

The Hon'ble F. A. Glover, *Judge.*

Robbery.

Queen *versus* Dwarka Aheer.

Committed by the Magistrate, and tried by the Sessions Judge of Shahabad, on a charge of Dacoity attended with Grievous Hurt.

Theft with violence is robbery.

A conviction under Section 397 of the Penal Code is equally good, whether the number of thieves be five or under.

THE prisoner in this case has been convicted under Section 397 of the Indian Penal Code, that is, of using a deadly weapon whilst engaged in the commission of robbery or dacoity. The Assessors found that a theft only had been committed; but, as the Judge remarks, theft with violence is robbery; and under the Section referred to, the conviction would be equally good whether the number of the thieves was five or under.

I see no reason to distrust the evidence recorded for the prosecution. The prisoner was a fellow villager, well known to all the witnesses, and they saw the assault at the distance of a few paces.

The defence is altogether unsupported; the two witnesses cited by the prisoner knew nothing of the matter to which they were summoned to depose.

The appeal is rejected, and the order of the Sessions Judge confirmed.

The 21st March 1865.

Present:

The Hon'ble F. A. Glover, *Judge.*

Dacoity with Murder—Fugitive offenders.

Queen *versus* Roopa.

Committed by the Magistrate, and tried by the Sessions Judge of Rungpore, on a charge of Dacoity attended with Murder.

Case of a prisoner who, after having committed Dacoity attended with Murder, absconded to Bhootan. On the annexation of the Bhootan Dooars by the British Government, he was arrested, and after conviction, was sentenced to transportation for life.

THIS is a supplementary trial. The original case, one of dacoity attended with murder, was disposed of by the late Sudder Court on the 11th July 1854, when Beersadoo, one of the principals in the outrage, was sentenced capitally.

Since the annexation of the Bhootan Dooars by the British Government, the prisoner Roopa, who was denounced from the first as one of the men who had murdered the deceased Durreah Doss, and who had absconded, has been living in Bhootan. Several of the witnesses in the case appear to have known of his whereabouts; but as his place of residence was within a Foreign Territory, they thought it useless to give information. On the Bhootan Dooars becoming British Territory, they arrested him.

The evidence against the prisoner appears to me sufficient. He was at one time a servant of Durreah Doss, and had been, shortly before the dacoity, discharged by him for theft. He admits himself that he was in the deceased's service, though, of course, he denies the reason of his being dismissed.

The deceased and his wife Musst. Neudoo, who still, according to the Sessions Judge's statement, bears about her the marks of old wounds, named the prisoner Roopa as well as Beersadoo immediately after they were attacked and wounded (all the witnesses are consistent on this point); and before the Police Durreah Doss repeated the accusation on oath, as did his wife. He died before he could depose before the Magistrate.

This, with the other evidence, satisfied the late Sudder Court of the truth of the charge as against Beersadoo, and I think it equally satisfactory against the prisoner Roopa; indeed, the evidence against both persons is precisely the same.

In accordance, therefore, with the recommendation of the Sessions Judge, I sentence the prisoner Roopa to imprisonment in transportation for life.

The 21st March 1865.

Present:

The Hon'ble E. Jackson and F. A. Glover, *Judges.*

Committal of accused without examining him or his witnesses—Procedure when Magistrate has prepared his charge—Witnesses for the defence—Appearance of accused at the Sessions by Mooktear.

Queen *versus* Hurnath Roy.

Committed by the Magistrate of Backergunge, on a charge of an offence under Section 155 of the Penal Code.

It is not illegal for a Magistrate to commit an accused to the Sessions without examining him or his witnesses.

The Magistrate, when he has prepared the charge is bound to read it to the accused, and to ask him if he wishes to have any witnesses summoned to give evidence on his behalf at the Sessions.

The Magistrate cannot refuse to permit an accused to attend at the Sessions by Mooktear.

MR. DOYNE, for the petitioner, contends that the whole of the proceedings of the Magistrate of Backergunge, in the case of his client, prior to the order committing him to the Sessions Court, on the charge of an offence under Section 155 of the Penal Code, have been illegal; that the Baboo was admitted to appear at the preliminary enquiry by mooktears; but that no defence was taken from his mooktear, and the witnesses for his defence were not summoned.

It appears that Baboo Hurnath Roy was at first summoned to appear personally before the Magistrate. But he put in a petition stating that he knew nothing of the circumstances of the case, while his Mofussil Agent, who did know all the facts, had been summoned and could explain all; and finally praying that his attendance at the enquiry before the Magistrate might be permitted by mooktear. The Magistrate at first refused this petition, but subsequently granted it. This was in September. In the month of November the Magistrate examined the witnesses for the prosecution, who were cross-examined; and he also made some examination of all the accused parties then on trial before him, with the exception of Hurnath Roy's mooktear; and he then committed the accused, including Hurnath Roy, to the Sessions, and directed that Hurnath Roy should attend the Sessions in person.

Mr. Doyne now urges that Hurnath Roy was not before the Magistrate at all, but it appears to us that he was present at the enquiry through his mooktear. He may not have appointed any special mooktear to attend on his behalf at the enquiry; but his general mooktear, who had presented the petition, must have been present. It is true that no mention was made of him. But it is not imperative under the law that any examination should be made of an accused; though by its Circular Letter No. 13 of the 28th July last, the High Court has pointed out to Magistrates the expediency of making such examination. In the case before us, however, the question is not whether the Magistrate exercised a proper discretion in the matter, but whether he acted according to law. We cannot interefere unless he acted illegally; and it is not illegal to commit an accused to the Sessions Court without examining him. Similarly, it is not illegal to commit an accused to the Sessions without examining his witnesses. When the Magistrate has prepared the charge against the accused, he is bound to read it to the accused and to ask him if he wishes to have any witness summoned to give evidence on his behalf before the Sessions Court. It does not appear that the Magistrate has put this question to Baboo Hurnath Roy's mooktear. But he will at once supply this omission.

The Magistrate, at his discretion, refused to permit Baboo Hurnath Roy to attend at the Sessions by mooktear; and the Judge was of opinion that, under the law, he could not pass any such order. No argument was raised on this point, but we see no reason at present to think the Judge's order wrong.

The Sessions Judge should lose no time in proceeding with the trial of this case.

The 22nd March 1865.

Present:

The Hon'ble E. Jackson and F. A. Glover, *Judges.*

Negligence with respect to animal—Evidence.

Queen *versus* Brojonarain Pubraj.

Tried by the Officiating Magistrate of Balasore, on a charge under Section 289 of the Penal Code.

A conviction under Section 289 of the Penal Code quashed, inasmuch as evidence did not allude to the negligence of which the accused has been found guilty, and because the evidence was not taken in the presence of the accused.

Mr. Justice Glover.—THE records of this case were sent for on the petition of Brojonarain, in order that the Court might satisfy itself as to the legality of the Magistrate's proceedings, and of the order of the Sessions Judge on revision, under Section 434 of the Code of Criminal Procedure, upholding them.

The petitioner was convicted under Section 289 of the Penal Code, and fined 5 rupees.

It appears from the record that a stallion belonging to him broke loose from his syce, whilst proceeding through the Balasore bazzar, and did some damage to the ponies of a Police Inspector and Constable.

I do not see how Section 289 can be applied to this case. The horse was being led by a syce (and as there is not the slightest attempt at proving that the animal was a vicious or unruly one, it was immaterial whether that syce was a man accustomed to the horse or not) and broke away from him frightened, as the petitioner alleges (and the allegation is not denied) by a passing buggy. It appears to me to have been a clear case of accident, and that no negligence can be attributed to the owner in consequence.

The remedy for those whose ponies had been injured by the loose horse, lay in the Civil Court.

I think, therefore, that the conviction under Section 289 was not warranted; but were the facts otherwise sufficient, the Magistrate's order would still have been illegal under Section 194 of the Code of Criminal Procedure, inasmuch as the evidence of the prosecution witnesses was not taken in the presence of the accused, who had consequently no opportunity of cross-examining them.

Mr. Justice E. Jackson.—I agree with Mr. Justice Glover that this conviction cannot stand. The evidence does not in any way allude to the negligence of which the Magistrate has found the accused guilty; and that evidence appears to have been taken behind the accused's back. The fine, if realized, must be returned to the accused.

The 23rd March 1865.

Present:

The Hon'ble E. Jackson, *Judge.*

False Evidence—Omission in charge.

Queen *versus* Bhuttoo Lallee and Seeboo.

Committed by the Magistrate, and tried by the Sessions Judge of Bhaugulpore, on a charge of False Evidence.

Though a charge does not distinctly specify the false statement on which the evidence of perjury is attempted to be established, the omission is not material if the accused has not been prejudiced thereby.

THESE prisoners have been convicted of giving false evidence and sentenced to one year's rigorous imprisonment.

The charge does not distinctly state, as I think it should, the false statement on which the offence of perjury is attempted to be established. But I see no reason to believe that the prisoners have been prejudiced by this omission. The proceedings show that the prisoners were, on their trial, aware what statement they were charged with having made falsely. The prisoners were cited as witnesses for the defence by a *gunja*-seller who had been charged by a Police Constable with using false scales. The *gunja* seller admitted that the scales were incorrect, but asserted that they had become so the previous night from a fall, and that the Constable had used them against his wishes. The prisoners supported this defence and denied that the *gunja* seller used the scales, and they deposed that the Constable had carried off the scales and brought the false charge because he wanted more *gunja* than he was entitled to.

It is quite clear that the *gunja* seller was using false scales, and that the Constable, finding he was being cheated, had the *gunja* seller taken up. The prisoners have given false evidence in support of their brother-shopkeeper, and have been properly convicted.

Reject their appeals.

The 1st April 1865.

Present:

The Hon'ble E. Jackson and F. A. Glover, *Judges.*

Lurking House Trespass by night—Grievous Hurt.

Queen *versus* Lukhun Doss

Committed by the Deputy Magistrate of Nugwan, and tried by the Sessions Judge of Midnapore, on a charge of House-breaking by night in order to the commission of Theft.

A prisoner who, in the commission of lurking House Trespass by night, voluntarily attempts to cause grievous hurt to the owner of the house who tries to capture him, is punishable under Section 460, and not under Sections 457 and 324 of the Penal Code.

Mr. Justice Glover.—THE prisoner was taken red-handed, and the evidence leaves no doubt of his guilt.

But I do not think that the Sections of the Penal Code, under which the Sessions Judge has convicted him, apply to the case; and so far, therefore, I would amend the Lower Court's order.

The prisoner has been convicted under Sections 457 and 324. Under the first he has been sentenced to 10 years' rigorous imprisonment in transportation (Section 59) with a fine of rupees 10 or further rigorous imprisonment for 7 days. Under the last he has been rigorously imprisoned for one dy.

This appears to me a very cumbersome way of sentencing the prisoner, the more especially when Section 460 of the Code provides exactly for the offence of which the prisoner has been found guilty. A *sindkatee* is certainly a dangerous weapon, and if the prisoner did not inflict what can technically be called grievous hurt under Section 220, he evidently attempted to do so, and kept on stabbing at Omapershad until overpowered and deprived of his weapon.

This seems to me to come exactly under Section 460. The prisoner, at the time of committing lurking house trespass by night, voluntarily attempted to cause "grievous hurt" to the owner of the house who was trying to capture him.

I would, therefore, alter the Sessions Judge's conviction from under Sections 457 and 324 to Section 460, and sentence the prisoner to 10 years' rigorous imprisonment, commutable to transportation for 10 years under Section 59, which, considering the prisoner's antecedents, is not too severe a punishment.

Mr. Justice Jackson.—I concur in the alteration which my colleague proposes to make in the conviction and sentence.

The 3rd April 1865.

Present:

The Hon'ble E. Jackson and F. A. Glover, *Judges.*

Charge under Section 185 Penal Code (by Magistrate and Collector).

Queen *versus* Gooroochurn Mozoomdar.

Appeal from a decision of the Assistant Magistrate, confirmed by the Magistrate of Tipperah.

Case of a conviction under Section 185 of the Penal Code, on a charge made by a Magistrate and Collector without signing his order as Collector.

Mr. Justice Jackson.—IT appears to me that there may have been an error in law committed by the Courts in convicting Gooroochurn Mozoomdar and Anund Chunder Ghose, under Section 185 of the Penal Code without the sanction of the Collector. But even here it is to be recollected that the Officer who ordered the Deputy Magistrate to enquire into the case was both Magistrate and Collector, though he does not appear to have signed his order as Collector. But I would not interfere with the sentences passed, as I think the prisoners have been fairly tried and are clearly guilty: Anund Chunder Ghose under Section 169 of the Penal Code, and Gooroochurn Mozoomdar under Sections 109 and 169 of that Code. It seems to have been proved to the satisfaction of the Deputy Magistrate that the sheristadar Anund Chunder Ghose was present as sheristadar at a sale under Act X of 1859, and that he employed Gooroochurn Mozoomdar to purchase at that sale a jote jumma for him in the name of his sister-in-law, the result being that he bought it at a very small sum, and re-sold it to the defaulter for 118 rupees. Section 15 Regulation II of 1793 prohibits Anund Chunder Ghose, as sheristadar, from

purchasing directly or indirectly any land which the Collector or his *locum tenens* may dispose of by public sale. Notwithstanding this law, he has made the purchase and thereby become involved in the offence contained in Section 169 of the Penal Code.

Mr. Justice Glover.—This case was sent for on the petition of Gooroochurn Mozoomdar.

It does not seem to me that there has been any illegality in the Magistrate's order, for, admitting that no charge under Section 185 of the Penal Code would lie without the sanction of the Collector, and that Mr. Pepper sent the case for investigation as Magistrate and not as Collector, the sheristadar was clearly obnoxious to Section 169, and the mookhtear to Section 109 of that Code; neither of which comes under Chapter IX of the Penal Code, nor consequently under Sections 168 and 169 of the Code of Criminal Procedure.

For the rest I concur in what has been recorded by my colleague, Mr. Justice Jackson; and as, whatever I may think of the strength of the case for the prosecution, there appears to be nothing contrary to law in the decision of the Assistant Magistrate or of the Magistrate, I see no reason to interfere, and agree in rejecting the petition.

The 3rd April 1865.

Present :

The Hon'ble W. S. Seton-Karr, E. Jackson, and F. A. Glover, *Judges.*

Theft by Servant in possession of property—Criminal Breach of trust by public Servant.

Queen *versus* Juggurnath Singh, Purmeshur Dayall, Jowahir Misser, and Kyalee Singh.

Committed by the Deputy Magistrate, and tried by the Sessions Judge of Cuttack, on a charge of Criminal Breach of Trust.

The prisoners were charged with having stolen a sum of money shut up in a box and placed in the Police Treasury buildings, over which they, as burkundauzes, were placed in guard. HELD that the charge should have been made under Section 381 of the Penal Code, (Theft by servant in possession of property) and not under Section 409 (Criminal Breach of Trust by public servant).

Mr. Justice Jackson.—THESE prisoners are charged with having stolen a sum of money above one thousand rupees, which was shut up in a box and placed in the Police Treasury buildings, and over which they, as burkundauzes, were placed in guard. The offence for which they have been tried and convicted is that, under Section 409 of the Penal Code, they, as public servants, having been entrusted with property, have committed Criminal Breach of Trust in respect of that property. But the Section in question does not apply to such a case as this. The proper charge against the prisoners is that of theft of the property of their master while being employed as servants under Section 381 of the Penal Code.

But, in my opinion, the charge of theft is not sufficiently proved against these prisoners. I observe that the assessor acquitted them, but the Judge considered that they were guilty. The Judge has gone most carefully into the grounds on which he holds that the prisoners are guilty, and I have considered them for some time, but cannot satisfy myself that the evidence amounts to more than suspicion of guilt against some one of the prisoners. The prisoners appear to have, according to the usual custom, kept guard one after the other during the night; one man being always awake, the other then asleep. It is admitted by Kyalee Singh, the burkundauze who was last on guard, and who commenced his gaurd after 4 o' clock A.M., that the box containing the rupees was then safe, and was made over to him by Juggurnath Singh the burkundauze who then went off gaurd. Kyalee Singh admits that the other then remained asleep. While he was on guard the lamp went out. It is very evident that the theft really took place at this time, and probably the burkundauze was then asleep, and the thief, after taking the money-box, put the lamp out. Kyalee Singh cannot explain how the lamp went out, which shews that he was then asleep. He afterwards found that there was no light, and went to obtain one from the Thannah, but put out the Thannah light on trying to light his lamp. Kyalee then returned, found the box gone, and awoke Juggurnath Singh and Purmeshur Dayall and the latter went and brought a light, and then it was clear that the box had gone. While they were talking about it, persons came from the Thannah, and began to search about. But the box was not found till several days after, and then on a boat in the river.

The suspicious facts against the prisoners are, that the light went out and the Thannah light was put out; and that, when they first discovered that the box was gone, they did not at once arouse the neighbours, but remained quietly searching for it. There is no doubt that all these circumstances amount to some feeling of suspicion that some one of the prisoners had a hand in the crime. But there is is no such evidence upon which I can satisfy myself that they are guilty, and deserving of the severe punishment of 7 years transportation, to which they would, in that case, be sentenced. There are clever thieves every where and my conviction is that the theft occurred while Kyalee Singh slept when the light was put out and that the thief and the money had disappeared before he awoke; a great deal is said by the Judge of the doors, with the exception of those in the front of the house, having been fastened from inside. But my impression is that the thief got in at the front door and left by the east door while the western door was opened to the burkundauzes after the theft was discovered. I would acquit the prisoners.

Mr. Justice Glover.—This case has been sent to me by Mr. Justice Jackson, who proposes to acquit all the prisoners.

The facts are detailed in my learned colleague's judgment, and there is no need for me to recapitulate them.

I concur in acquitting Jowahir Misser. It is not denied by the prisoner Kyalee Singh that Jowahir was off guard and asleep when he went for the light, nor that he was still asleep when, on his return, he (Kyalee) found the money box gone.

With regard to the prisoner Purmeshur Dayall also, although Kyalee says that he awoke him when the lamp went out, this statement is opposed to that of the other Constable Juggurnath Singh, who avers that he only was roused by Kyalee, and that the other two Constables remained asleep till after the theft was discovered. There is nothing in my opinion against this prisoner.

I concur also in acquitting Juggurnath; the box was safe when he gave over charge to the prisoner Kyalee; and it is not in the least degree probable that he would have taken advantage of Kyalee's going away for a light to steal the box, break open two doors, fling the box into the river, and return again all in the space of three or four minutes. The suspicion against him is of the vaguest kind, and is quite insufficient for conviction.

There remains the prisoner Kyalee. Against him there is, I think, that amount of violent suspicion, which is sufficient for conviction. When he took the watch, the money, as he himself admits, was safe. It continues so according to his accounts till the light goes out; instead of calling to a comrade at the thannah, which was a few yards distant only, exactly opposite across the road, he goes himself for a light and by some unexplained awkwardness contrives, instead of getting what he wants, to put out the Thannah light also. When he returns, still in the dark, he at once goes into the room where the money had been deposited, and begins to grope about for the box. This, to my mind, is an exceedingly strange phase in the prisoner's conduct. Three or four minutes before, he had seen the box in safety. If I am to believe his statement, he had left a comrade on guard, yet the moment he returns he commences hunting for the box in the dark. Still stranger, when he discovers the loss, he says nothing about it to superior authority, but remains silent, though he was specially the party to have reported the circumstance till the angry recriminations of his fellow Constables excite the attention of the Inspector at the Thannah who comes across the road to enquire, and then the tale is at last told.

Now the money was safe when the prisoner went for the light. I take his own statement; and to suppose that an outside thief took advantage of his absence to enter the room and carry off the box, is to suppose that the man had been patiently waiting all night on the look-out for an opportunity which he could never have expected to occur, and that having got it, he went inside a pitch-dark room, the door of which was guarded by a Constable, secured the box, opened one of the side doors, and made off with the money all within the few minutes the constable was away.

I do not say that such a chain of circumstances is impossible; but the facts of this case disclose that amount of violent presumption against Kyalee, that he either stole the money himself, whilst on guard, or that he permitted some one to do so, which is sufficient to justify a conviction.

But this conviction should not be under Section 409, which refers to cases of public servants and others having "dominion over property," such as bankers, attorneys, and the like. The prisoner had no dominion over this property—he only had charge of the box which contained it; and I agree with my colleague that the crime here disclosed is "theft" by a servant under Section 381 of the Indian Penal Code which is punishable by seven years' imprisonment and fine at most.

And, taking all the circumstances of the case into consideration, I think a sentence of 5 years' rigorous imprisonment sufficient. With respect to this prisoner, the papers must be laid before another Judge.

Mr. Justice Seton-Karr.—This case has been sent to me on account of the prisoner Kyalee Singh only.

I agree with Mr. Justice Glover in considering the conviction to be a good conviction. Indeed, the hypothesis which would acquit this man does not appear to me a reasonable hypothesis, while the facts and admissions seem to me to amount to far more than mere moral suspicion, and to lead only to the conclusion of guilt.

It is not attempted to be shown that any other persons, save and except the Policemen in charge of the box, ever knew of the existence of the money, or had access to the room where it was kept. Two doors, closed at night from the inside, were found open in the morning. The prisoner Kyalee Singh,

as he at last admitted, received charge of the property intact from his predecessor. His own light goes out, and, in endeavouring to get his lamp re-lit at the Thannah, a few yards off, he manages to put out the lamp at the latter place also. On his return to his post, he at once begins to grope about for the box, does not find it in its place, and yet gives no alarm.

If we believe this story, we must believe it with all its improbabilities; and we must further suppose, without one tittle of evidence, that in that brief interval some unknown thief, who had by some extraordinary means previously become acquainted with the existence of the money and the position of the box, had noiselessly got into the room and had made off with the booty.

I hold that, on the unimpeached evidence as to the placing of the box in the room in question, and to its disappearance and to the other facts, the explanation of the prisoner is so incredible that the two circumstances together leave no reasonable doubt of the validity of the conviction.

Concurring with Mr. Justice Glover, I sentence this prisoner to 5 years rigorous imprisonment. My colleagues have decided that the conviction should be under Section 381, and not under Section 409.

The 1st April 1865.

Present:

The Hon'ble E. Jackson and F. A. Glover, *Judges.*

Commitment (Annulment of)—Compromise.

Queen *versus* Salim Sheik.

Referred under Section 335 Act XXV of 1861.

A Commitment once made by a Magistrate to the Sessions cannot be annulled by his allowing the prosecutor to file a compromise.

Mr. Justice Jackson.—The Cantonment Magistrate seems to have considered it necessary to draw out a charge against the prisoners before he examined them, and he does not seem to have been aware when he took their answers on the charge that he was thereby committing them to the Sessions. However this may be, the Cantonment Magistrate, after he had committed the prisoner for trial under Section 226 of the Procedure Code, had no authority to quash the commitment. His order accepting a razeenamah, and safeenamah is without jurisdiction, and consequently void. The Sessions Judge should fix a day for the trial of the prisoners before him, and direct the Magistrate to have all the parties in attendance on the date fixed by him. As regards the persons against whom the Sessions Judge thinks proceedings ought to be taken, he can apply the provisions of Section 435 of the Procedure Code.

Mr. Justice Glover.—There can be no doubt that a commitment, once made by a Magistrate to the Sessions, cannot be annulled by the former allowing the prosecutor to a file a compromise. Such case, morover, must go to trial when once committed, however incomplete the original investigation may have been.

But, if this investigation be found to be incomplete, the Sessions Judge has the remedy in his own hands, and can summon, and examine any witnesses he thinks proper under Section 367 of the Criminal Prodecure Code.

There appears to be, therefore, no necessity for quashing the Joint Magistrate's commitment, as his investigation, though it may have been unsatisfactory, has certainly not been illegal.

The reason given by the Joint Magistrate for accepting the razeenamah is untenable. Basiruddeen having once on oath charged the accused parties with a crime cognizable by the Court of Sessions must be bound over to prosecute. He cannot now withdraw his charge except at the expense of his recognizances. For the rest, I concur with Mr. Justice Jackson.

The 3d April 1865.

Present:

The Hon'ble E. Jackson and F. A. Glover, *Judges.*

Amends—Theft.

Queen *versus* Gogun Sein and others.

Reference under Section 434 Act XXV of 1861.

Amends cannot be awarded for a false charge of theft.

It has been frequently ruled by this Court that "amends" can only be awarded in respect of cases coming under Chapter XV of the case of of the Criminal Procedure and as

the case referred by the Magistrate was one of theft under Section 379 of the Indian Penal Code, the order of the Deputy Magistrate was illegal, and should be quashed.

The 5th April 1865.

Present:

The Hon'ble E. Jackson and F. A. Glover, *Judges.*

Explanations of prisoners (Filing of)—Transfer by High Court of a case from one Magistrate to another.

Queen *versus* Kisto Chunder Ghose.

Appeal for the transfer of his case from the file of the Deputy Magistrate of Diamond Harbour to that of any other Officer.

A Magistrate is bound to file with the record any explanation that a prisoner wishes to make.

It is only where there is reason to suppose that the prisoner will not have a fair trial, that the High Court will transfer a case from one Magisterial Officer to another.

WE see no reason to alter the former order* passed on this application.

The Deputy Magistrate showed a great want both of temper and discretion in dealing with the petitioner's written statement: and his explanation is not, the Court considers, satisfactory. The Deputy Magistrate was bound to file with the record any explanation the petitioner wished to make.

But admitting all this, we do not see in it any sufficient reason for supposing that the man will not have a fair trial, and it is only in cases where circumstances tend strongly to such a conclusion that this Court would exercise its authority in transfering a case from one Magisterial Officer to another.

The petitioner will be directed, therefore, to appear at once before the Deputy Magistrate, who will take up the case, and dispose of it as speedily as possible, taking care to summon such of the witnesses named by the petitioner in his written statement, as the latter may wish to have examined.

The 10th April 1865.

Present:

The Hon'ble E. Jackson and F. A. Glover, *Judges.*

Answers of accused.

Queen *versus* Poresh Narian Roy, Rookinee Debea, and Bukteshury Debea.

* No. 231 to the Sessions Judge of the 24-Pergunnahs, dated 15th March 1865.

Referred under Section 434 of the Code of Criminal Procedure, and Circular Order of 15th July 1863.

An order of fine quashed as made without the answers of the parties fined being taken to the offence charged.

THE Sessions Judge is of opinion that the Joint Magistrate's order under Section 174 of the Penal Code is illegal and should be set aside. It appears that the Joint Magistrate served summonses under Section 252 of the Procedure Code, calling upon certain parties to show cause why they should not enter into recognizances to keep the peace. Those parties did not attend on the day fixed for their attendance by the summons. The Joint Magistrate then issued warrants to enforce their attendance. Upon this they all appeared by agent and expressed their readiness to enter into recognizances, and were ordered to give them. But the Joint Magistrate on the same day took the answers of the above persons' agents, as to why they had not appeared on the day originally fixed in the summons. The reply was that the agents had received no instructions to attend. Upon this the principals were fined 50 rupees each. The Joint Magistrate did not put the persons whom he has fined upon their answers to the charge; and the agents were not asked to explain why the principals had not been present. The principals were fined without their answers being taken to the offence for which they were punished. The fines in question must be remitted, and, if paid, returned to the parties.

The 10th April 1865.

Present:

The Hon'ble E. Jackson, *Judge.*

Dacoity—Award of portion of fine to complainant.

Queen *versus* Bissonath Mundle, Srimunt Mundle, Chinibash Tatee, Koonjoo Bagdee, and Ishen Paul.

Committed by the Deputy Magistrate, and tried by the Sessions Judge of Moorshedabad, on a charge of Dacoity.

The Sessions Judge should record under what Section, or on what grounds, he orders a portion of the fines inflicted on prisoners convicted of Dacoity to be made over to the complainant.

I HAVE read the charge of the Sessions Judge to the Jury in this case, and the grounds upon which the several prisoners ap-

peal. They do not allege there has been any illegality in the procedure of their trial or in the sentences passed upon them. But they urged that the accomplice denounced them through enmity, and that his evidence is not sufficiently corroborated. It is clear from the Judge's charge that the evidence of the accomplice is very strongly corroborated on many points, *viz.*, by other evidence showing that the prisoners were together on the night of the dacoity, and by their own confessions in which some of them pointed out the exact spot where the dacoits assembled and how they acted. The Jury, on this evidence, has found the prisoners guilty, and their verdict is final. The sessions Judge should have recorded under what Section or on what grounds the sum of 300 Rupees out of the fines inflicted on the prisoners was ordered to be made over to the complainant.

The 10th April 1865.

Present:

The Hon'ble G. Campbell and E. Jackson, *Judges.*

Hurt—Grievous Hurt—Right of private defence.

Queen *versus* Sohun and Samoo.

Tried by the Sessions Judge of Patna, on a charge of causing Grievous Hurt.

In cases of Hurt or Grievous Hurt, the question should be considered, as to who was the aggressor, and whether the offence was committed in the exercise of the right of private defence.

Mr. Justice Campbell.—THIS is a trial by Jury, and the only question is whether the Judge has rightlyc harged the Jury. I think there is an error in the charge. He makes the question to be whether the prisoners acted on grave or sudden provocation, whereas it seems to me that the real question was whether they, in any way, exercised a right of private defence. As usual, they pleaded neither sudden provocation nor private defence, alleging an *alibi;* but the one would come under judicial notice as well as the other. I observe that in these affray cases there is generally far too much neglect of this question of private defence. The enquiry is generally solely directed to the question who struck the blow—not to the question who was in the wrong in the original subject of quarrel. This seems to me quite a mistake. The essence of the case should be, I think, to ascertain who was the aggressor, and whether a party acted in right of defence or otherwise. It never was intended that a man should submit to the deprivation of property in his possession without exercising any right of self-defence, and trust to recover it by the tedious operation of a case in the Civil Court with all the weight of possession, *onus* of proof, &c, against him. Generally, as I said, this point is neglected. But in this case it appears most distinctly from the Judge's charge (as well as from the evidence) that the prisoners were in possession of the disputed property, and that there was, on the part of the prosecutors, "an attempt to oust them from the occupation of a certain piece of land, and a direct interference with this building." Again, "no doubt the attempt to oust was a provocation;" "it involved a question of title for the adjudication of which proper Courts are appointed, and there was nothing to require instant assertion of the prisoners' rights." Now, as I said, a future remedy in a Civil Court is a very different thing from possession, and there are no Courts or Authorities, which would have protected the prisoners' possession if they had not helped themselves. It seems to me clear that the prosecutors committed a Criminal Trespass on property in possession of the prisoners; that prisoners finding themselves about to lose possession got swords and used them to the extent of slightly wounding two of the trespassers in the hand. Now the Penal Code, Section 104, extends the right of private defence of property against Criminal Trespass to any harm other than death, provided the property could not be defended otherwise than by causing such harm. The point would be whether prisoners used more violence than was necessary. I think the question should have gone to the Jury whether the acts of the prisoners were acts of private defence within the definition. If the prisoners had no alternative but either to lose the possession of the property or wound the trespassers as they did, they would be entitled to an acquittal. Perhaps we might remand the case for a new verdict under the above directions.

Mr. Justice Jackson.—I concur, for the most part, in Mr. Justice Campbell's remarks, more especially as respects the constant omission in Sessions Judges' to consider the question of whether the offence of hurt or grievous hurt had been committed in the exercise of the right of private defence. In this case the complainant's witnesses all admit that Megher Singh was the last

occupant of the house which the prisoners were re-building, and that the prisoners had been for ten days engaged in erecting the walls of the house, when the zemindar of the village Shibdayal opposed them; and Megher Singh has himself deposed that the prisoners were re-building the house with his consent. I think then that any assault which the prisoners might have then and there committed in order to protect their possession of the property, might certainly have been justified under the Sections of the Penal Code which acknowledge the right of private defence. But this right could hardly extend to the act of the prisoners in going to their own houses, and returning armed with swords and using them. It could hardly be said that this was not inflicting more harm than was actually necessary for the purpose of defence. I would not then return the case for a new trial. But accepting the verdict of the Jury, and considering the provocation which the prisoners received, and their right of private defence, which, after all, they have not exceeded to any large extent, I would reduce the sentence to three months simple imprisonment.

Mr. Justice Campbell.—I think the ends of justice will be sufficiently met by the reduction proposed by my colleague in the sentence, which, under the circumstances, is clearly too severe, I therefore concur in the order proposed by Mr. Justice Jackson.

The 10th April 1865.

Present:

The Hon'ble F. A. Glover, *Judge.*

Jury—Misdirection.

Queen *versus* Seetanath Ghosal.

Committed by the Deputy Magistrate of Diamond Harbour, and tried by the Sessions Judge of the 24-Pergunnahs, on a charge of False Evidence.

There is no misdirection in a case of False Evidence on a Judge pointing out to the Jury the contrast between the evidence for the prosecution, and the course followed by the prisoner (namely a simple denial of the charge coupled with a refusal to examine the witnesses in attendance), so long as the Judge left it to the Jury to decide between the opposing statements, and to credit whichever they thought most worthy of belief.

THIS is an application to have the verdict of the Jury in the case of the Queen *versus* Seetanath Ghosal, set aside on the ground of misdirection.

The misdirection complained of is that the Judge unduly pressed upon the attention of the Jury and recommended them to adopt the evidence for the prosecution, and refused to allow the Jury to visit the spot where the tree in dispute had stood, and so prevented them from coming to a right conclusion.

I have read over carefully the Sessions Judge's charge, and find no undue pressure laid upon the Jury. The Sessions Judge commented on the evidence for the prosecution, and contrasted it with the course followed by the prisoner (a simple denial of the charge coupled with a refusal to examine the witnesses, who were in attendance). I think he was quite right to point out the contrast so long as he left it to the Jury, which the Sessions Judge did, to decide between the opposing statements, and to credit whichever they thought most worthy of belief.

With regard to the second objection, the prisoner was charged with using certain words (which are stated in the calendar) on oath, knowing them to be false. These were that Dr. Mazzuchelli threatened to cut down the tree to establish a butcher's shop on the spot, &c. &c. Manifestly it could not have assisted the Jury in determining whether this charge were true or false, to have visited the spot and have seen the condition in which the remains of the tree were, inasmuch as the gist of the case was not so much whether Dr. Mazzuchelli had the tree cut down, as whether he used the improper language atributed to him by the prisoner. The Jury had to decide between two statements, and they, on the evidence, held that Dr. Mazzuchelli and his witnesses spoke the truth, and consequently that the prisoner had perjured himself.

I think, therefore, that there was no misdirection on the part of the Sessions Judge, and that this application should be rejected.

The 13th April 1865.

Present:

The Hon'ble C. B. Trevor and G. Loch, *Judges.*

State Offences—Jurisdiction—Trial of British Subject for acts done within or without British Territory.

Queen *v.* Moulvie Ahmudoollah.

Mr. H. A. Eglinton and *Baboos Kishen Kishore Ghose* and *Juggadanund Mookerjee* for the Prosecution.

Mr. W. L. Mackenzie for the Defence.

A person who is admittedly a subject of the British Government is liable to be tried by the Courts of this

country for acts done by him whether wholly within or wholly without, or partly within and partly without, the British Territories in India, provided they amount together to an offence under the Penal Code.

THE prisoner is charged on the following counts:—

1*st*.—That he attempted to wage war against the Queen, and thereby committed an offence punishable under Section 121 of the Indian Penal Code.

2*nd*.—That he abetted the waging of war against the Queen and has thereby committed an offence punishable under Section 121 of the Indian Penal Code.

3*rd*.—That he has abetted the attempt to wage war against the Queen, and has thereby committed an offence punishable under Section 121 of the Indian Penal Code.

4*th*.—That he abetted the collection of men with the intention of waging war against the Queen, and has thereby committed an offence punishable under Sections 109 and 122 of the Indian Penal Code.

5*th*.—That he, by illegal omission, concealed the existence of a design to wage war against the Queen, intending by such concleament to facilitate the waging of such war, and has thereby committed an offence punishable under Section 123 of the Indian Code.

The Judge has found the prisoner guilty on the 2nd, 4th and 5th counts. He acquits him of the first count, and considers the 3rd merged in the 2nd; the Judge has passed a sentence of death and forfeiture of property on the prisoner which sentence is submitted for the confirmation of this Court under Section 380 of the Code of Criminal Procedure, and the prisoner filed an appeal against the finding and conviction under Section 408 of the same Code.

The Counsel for the prisoner raised a legal objection that the prisoner had not committed an offence punishable by the Penal Code; that on reference th the remarks made by Morgan and Macpherson in their edition of the Penal Code, and to the illustrations appended to Section 121 of that Code, it was clear that the words "waging war" meant an insurrection or rebellion within the British Territories, and had no reference to a war waged by foreign enemies, or by parties owing allegiance to the Queen, if such war were waged outside of the British Territories. The prisoner had been acquitted on the first count; and the Counsel contended that, if the view of the law which he took were correct, the prisoner could not be convicted of abetment under the 2nd, or on any other count of the charge, as the war had not been waged within the British Territories. And that even, if assistance had been rendered (an allegation by no means satisfactorily proved against the prisoner), it had been given to parties not within the territory, and it was therefore immaterial whether such parties were foreign enemies, or persons owing allegiance to the Queen.

The contention of the learned Counsel for the prisoner cannot, we think, be sustained. The prisoner is admittedly a subject of the British Government. By Section 2 of Act I of 1849, which is still in force, he is amenable to the law for all offences committed by him within the territory of any Foreign Prince or State; and by Section 3 of the Penal Code, he is to be dealt with according to the provisions of the Code for any act committed beyond the territories vested in Her Majesty by the Statues 21 and 22 Vic. Ch. 106 in the same manner, as if such act had been committed within the said territories. Whether, therefore, the acts which the prisoner did, were wholly within or wholly without, or partly within and partly without, the territory of Her Majesty, if they together amount to an offence under the Penal Code; he is liable to be tried for them by the Courts of this country.

* * * * * *

We think that the evidence before us is sufficient to support the conviction of the prisoner under Section 121 of the Penal Code, upon the second count of the charge; but as we do not find from that evidence that the prisoner took a more active part in this conspiracy than others who have been convicted and sentenced, we decline to confirm the sentence of death passed by the Sessions Judge, but direct that the prisoner Ahmudoollah be transported for life, and do forfeit all his property to Government.

The 18th April 1865.

Present:

The Hon'ble F. A. Glover, *Judge*.

Kidnapping or abducting a woman to compel her marriage—Consent of girl under 16 years.

Queen *versus* Amgad Bugeah.

Committed by the Joint Magistrate, and tried by the Sessions Judge of Tipperah, on a charge of Kidnapping under Section 366 of the Imdian Penal Code, &c.

The consent of a girl under 16 years, kidnapped or abducted to compel her marriage, does not affect

the offence; nor is it necessary that the taking or enticing should be shown to be by means of force or fraud.

THIS is a very clear case.

The girl, who is under 14 years of age, deposes that the prisoner met her on the road and carried her off forcibly to his house with the intention of marrying her. That she was so taken to the prisoner's house, is proved by the evidence, and it was in that house that the Police found her.

The defence is, that the girl married the prisoner of her own accord, and that her brother agreed to the arrangement; but this statement is totally unsubstantiated, the person who is said to have performed the marriage service, denying all knowledge of the transaction.

But even supposing so much of the defence true, that the girl did consent, that circumstance would not affect the present charge. It is proved that the prisoner either took or enticed her, she being a girl under 16 years of age, from the keeping of her lawful guardian, and the consent of such kidnapped person would be immaterial; nor would it be necessary that the taking or enticing should be shewn to be by means of force or fraud.

The appeal is rejected.

RULINGS OF THE HIGH COURT IN CRIMINAL CASES.

The 19th April 1865.

Present:

The Hon'ble F. A. Glover, *Judge.*

Theft and taking or retention of stolen goods.

Queen *versus* Sreemunt Adup.

Committed by the Deputy Magistrate of Howrah, and tried by the Sessions Judge of Hooghly on a charge of Theft, &c.

The theft and the taking and retention of stolen goods form one and the same offence, and cannot be punished separately.

THIS case was tried with the aid of a Jury, and there is consequently no appeal except on points of law.

I think that the Sessions Judge's charge might have been more carefully worded. For instance, he speaks of the theft, of the finding of the bag, and of the consequent arrest of the prisoner with that bag, as being 'admitted.' Now, the only meaning that could possibly be attached to these words would be that the prisoner 'admitted' the facts referred to, whereas he did no such thing. The Jury ought to have been told that these circumstances were deposed to by such and such witnesses.

This, however, does not amount, under the circumstances of the case, to a misdirection.

For the rest, the evidence, such as it is, was laid before the Jury, and they thought proper to convict upon it. This evidence might have been unsatisfactory, but it was legally sufficient, and that is the only point I have to do with in considering this appeal.

I must reject it, therefore; but the prisoner ought not to have been convicted on the *2nd* and *3rd* counts of the charge. As he has been found guilty of the original theft, the taking of the bag of pice from the place where it had been concealed in the plantain clump, was part and parcel of that crime, and ought not to have been made into a separate and distinct offence.

So likewise with regard to the conviction of "knowingly retaining stolen property." It has been frequently ruled by this Court that in cases like the present the theft and the retention of the stolen goods form one and the same offence, and cannot be punished separately.

The 19th April 1865.

Present:

The Hon'ble E. Jackson and F. A. Glover, *Judges.*

Whipping (in addition to imprisonment) —House-breaking by night and Theft.

Queen *versus* Tonaokoch.

Referred under Section 434 *Act XXV of* 1861, *and Circular Order No.* 18, *dated* 15*th July* 1865.

Section 3 Act VI of 1864 does not allow of whipping in addition to imprisonment in the case of a fresh conviction.

House-breaking by night and theft form a single and entire offence and cannot be punished separately.

THE Officiating Deputy Commissioner has mistaken the meaning of Section 3 Act VI of 1864, and has sentenced the prisoner to stripes in addition to imprisonment although no previous conviction for the same offence had been recorded against either of them.

So much of his order is, therefore, cancelled.

The Court desire the Judicial Commissioner to bring the subject of this reference to the notice of his subordinates generally; and also to draw their attention to the Circular Letter of this Court No. 926, dated October 3rd, 1864, wherein is laid down that, if a man break into a dwelling-house at night and steal property therefrom, the crime is in its nature one single and entire offence, and should be treated accordingly. The Assistant Commissioner should have convicted the prisoner under Section 457 only.

The 20th April 1865.

Present:

The Hon'ble F. A. Glover, *Judge.*

False Evidence—Corrupt intention.

Queen *versus* Rhutten Ram.

Committed by the Joint Magistrate, and tried by the Sessions Judge of Shahabad, on a charge of False Evidence.

Corrupt intention in giving false evidence may be inferred from circumstances.

THE facts of this case are not contested. The prisoner now admits that he did realize

money on two decrees, and defends himself by saying that, when originally examined, he was confused and did not know what he was saying.

The circumstances under which the false evidence was given are fully detailed in the Sessions Judge's proceedings; and the only question for the Court to consider is whether the statement on solemn affirmation, to the effect that he had only realized on one decree and not on two, was false evidence intentionally given.

Corrupt intention may be inferred from circumstances; and those detailed in the Lower Court's judgments are, I consider, sufficient to warrant the inference.

The prisoner had every reason to conceal the fact of his having realized more money belonging to the minor's estate; and as to his plea of being confused at the time the question was put to him, I remark that he was allowed several opportunities of telling the truth, and that the realization of the amount due on the second decree formed the subject of a conversation in Court before the question was actually put to the prisoner. He had ample time to correct himself, and he could hardly have forgotten the circumstance that he had received money on account of the second decree on no less than three different occasions, on all of which he gave a receipt for the money realized. I see, therefore, no reason to interfere, and reject the prisoner's appeal.

The 21st April 1865.

Present:

The Hon'ble E. Jackson and F. A. Glover, *Judges.*

Joint Magistrate vested with full powers (not subordinate to Magistrate)—Disputes concerning right of way (Procedure).

Queen *versus* Toyluckonauth Sircar.

Referred under Section 434 *Act XXV of* 1861, *and Circular Order, dated the* 15*th July* 1863.

A Joint Magistrate vested with full powers is not, *quoad* cases instituted before and tried by him, subordinate to the Magistrate; and the latter Officer has no power to quash his proceedings or to hear them on appeal.

In a case of dispute concerning a right of way, the Magistrate, instead of deciding against the complainant on the ground that he already has another way of approach to his own house, ought to enquire whether or not the new road has been in the use and occupation of the complainant, and, if so, to retain him in it, leaving the owner of the land to determine the question of right to the easement in the Civil Court.

Section 320 of the Code of Criminal Procedure does not require that there should be an apprehended breach of the peace before the authorities can interfere to decide a right of way.

THIS case has been referred under Section 434 of the Code of Criminal Procedure.

The point in dispute was the right of way claimed by Sarodapershad Mookerjee over some land in the possession of the defendant Toyluckonauth Sircar.

The case was heard and disposed of by the Joint Magistrate, who decided that as the complainant had already a means of ingress and egress by another road, he had no right to make use of that one which passed through the defendant's land.

Some little time after the defendant commenced building a wall on the disputed road (the former obstruction was a mat tatee only); and the plaintiff again petitioned this time to the Magistrate.

The defendant also appeared, pleading the Joint Magistrate's order: but the Magistrate decided that the case was not a *res adjudicata*, and quashed the Joint Magistrate's proceedings on the ground that the real issue under Section 320 had not been tried. He then sent the case to a Deputy Magistrate with full powers, who, considering that no breach of the peace was likely to occur, refused to adjudicate, although he ordered the defendant to desist in his building till the right to do so was settled by the Civil Court.

We have no doubt that the Magistrate's action was without jurisdiction. The Joint Magistrate being vested with full powers was not, *quoad* cases instituted before and tried by him, the Magistrate's subordinate, and the latter officer had no power to quash his proceedings or to hear them on appeal. The law on this subject has already been laid down in the Courts' letter No. 504, dated 29th June 1864.

It would appear from the Joint Magistrate's order that that officer did mistake the proper issue; and decided against the plaintiff on the ground that he had already another way of approach to his house instead of enquiring, as he ought to have done, into the question whether or no the new road was open to the use of complainant according to the procedure laid down in Section 320 of the Code of Criminal Procedure.

But whether right or wrong the Joint Magistrate's order was not appealable to the Magistrate, nor had the Magistrate any right to interfere with it; and this being so, it follows that the ulterior proceedings of the

Deputy Magistrate were informal and consequently null.

We remark, moreover, that the Deputy Magistrate appears to have misconstrued the law equally with, though in a different manner from, the Joint Magistrate.

There is nothing in Section 320, which makes it imperative that there should be an apprehended breach of the peace before the authorities can interfere to decide a right of way.

Section 404 of the Code of Criminal Procedure gives this Court the power to send for, and take up, any proceedings of a Magistrate either in Civil or other trials, and if it find that there has been an error in point of law, to amend the error and pass such order as may appear legal and pooper.

In this case the Joint Magistrate ought to have decided whether the complainant was in the use and occupation of the new road, and for how long, and if he held him to be in such possession, to have retained him in it, leaving the owner of the land to determine the question of right to the easement in the Civil Court.

The complainant has been unfairly prejudiced by the Joint Magistrate's proceedings, and we therefore annul all the orders that have been passed in this case, and remand it to the Court of first instance for enquiry in accordance with the provisions of Section 320 of the Code of Criminal Procedure.

The 22nd April 1865.

Present:

The Hon'ble E. Jackson and F. A. Glover, *Judges.*

Commitment—Evidence to be recorded.

Queen *versus* Mr. R. Anderson.

Referred under Section 434 of Act XXV of 1861 and Circular Order No. 18, dated 15th, July 1863.

A Magistrate making an enquiry with a view to commit, is bound to record specially the evidence on which the commitment is made.

THE proceedings of the Assistant Magistrate in this case were clearly irregular. There was no absolute necessity doubtless for the party complained against to prosecute; but in accordance with paragraph 6 of this Court's Criminal Circular No. 19, the Magistrate making an enquiry with a view to commit, was bound to take the usual legal steps and record specially the evidence on which he thought the commitment justifiable.

The evidence in support of the prosecution should have been taken *de novo*, and it was illegal to make it depend on the failure of the original prosecution to support the charge of "illegal duress."

The Assistant Magistrate has committed the case on what is not legal evidence, and we therefore annul his order, and direct him to proceed "*de novo.*"

The 24th April 1865.

Present:

The Hon'ble F. A. Glover, *Judge.*

House-breaking by night.

Queen *versus* Emdad Ally.

Committed by the Magistrate, and tried by the Sessions Judge of Hooghly, on a charge of House-breaking by night with intent to commit Theft.

Effecting an entrance into a house at night by scaling a wall, constitutes House-breaking by night under Section 445 of the Penal Code.

THERE is no ground of appeal in this case. The evidence shows that the prisoner was caught at night inside the prosecutor's house, and that he could only have effected an entrance by scaling a wall. This, if proved, would constitute House-breaking by night under Section 445 of the Penal Code.

The Jury considered the evidence adduced for the prosecution sufficient, and there is a finding with which there is no interference allowed, no point of law being involved.

The appeal is rejected.

The 24th April 1865.

Present:

The Hon'ble E. Jackson and F. A. Glover, *Judges.*

Counterfeiting Stamp paper.

Queen *versus* Shurroop Chundet Doss.

Committed by the Assistant Commissioner and Magistrate, and tried by the Deputy Commissioner of Cachar, on a charge of Counterfeiting Government Stamp.

The passing off of a one anna Stamp as a one rupee Stamp is not counterfeiting a one rupee Stamp.

Mr. Justice Glover.—THE prisoner in this case has been convicted under Section 260 of the Indian Penal Code of using, as genuine, a Stamp paper knowing it to be

a counterfeited one, of another Stamp paper issued by Government for the purpose of revenue.

It appears from the record that one Malvi Meeah, wishing to purchase a small plot of land, applied to the prisoner to draw the conveyance. Prisoner did so, and also supplied the Stamp paper (the would-be purchaser not having one) alleging, as the witnesses for the prosecution say, that it was of the required value, *viz*, one rupee. Some time after Malvi was informed that his vendor's property was advertised for sale, and that amongst it was the piece of land he had bought. He went into the station on hearing this, and objected to the sale, when he was told that his conveyance was worthless, being written on a Stamp of inadequate value, on a one anna instead of on a one rupee paper.

Many witnesses have been examined on either side. Those for the prosecution declare that the prisoner said, and they understood, that the paper on which the conveyance was written was a one-rupee Stamp. Those for the defence, that the Stamp furnished was a one anna one, and that the purchaser Malvi knew that it was insufficient, but intended to have the kubalah copied afterwards on to a paper of the requisite value. There is a direct conflict of evidence, and it would be difficult to say which is the most trustworthy.

But setting this aside for the moment, it appears to me that the conviction is bad in law. The prisoner is convicted under Section 260; but the Stamp paper filed is a perfectly genuine one-anna Stamp; it is not, moreover, a counterfeit of any other Stamp. It is true that on two of the Bengalee letters of the word 'anna' *semi opaque* blots, of ink apparently, have been dropped. But there has not been the slightest attempt made to alter the word 'anna' into "*Roopya*," or indeed to alter the former word at all; and the word 'anna' in the Persian character is perfectly intact.

It cannot be said, supposing for the sake of argument that these blots were placed over the letters in question by the prisoner, that there has been any attempt to counterfeit a one-rupee Stamp. If the evidence on the part of the prosecution be perfectly reliable, the most that the prisoner could be found guilty of, would be cheating, in selling to the prosecutor a genuine one-anna Stamp, and saying that it was a one-rupee Stamp; I think that the prisoner should be released.

Mr. Justice Jackson.—I concur with Mr. Justice Glover. The Stamp used was not a counterfeit stamp at all.

The evidence rather proves that a one-anna Stamp was used with the consent of all *parties* instead of a one-rupee Stamp. The deed of sale is not denied by the parties who sold the land, and even they admit that it was drawn out on the one-anna Stamp because they were in a great hurry for the money, and a one-rupee Stamp was not forthcoming. The prisoner will be acquitted.

The words "conjointly with five or more persons" redundant in a charge of Dacoity.

Extract (paras. 1 and 4) of letter No. 10, from the Registrar Appellate High Court, to the Sessions Judge of Behar, dated the 6th January 1865.

(Criminal Side.)

Present:

The Hon'ble C. B. Trevor, *Judge.*

1. I am directed to communicate the following observations on your Criminal returns for November last.

4. In the charge against the prisoner, Boonee, and two others, Case No. 4 of Statement 4, the words "conjointly with five or more persons" were redundant, inasmuch as the fact of five or more persons being concerned is implied in the term "Dacoity," as defined in Section 391 of the Indian Penal Code.

Convictions under Sections 201, 202, and 203 of the Penal Code.

No. 11.

From the Registrar of the High Court &c., to the Sessions Judge of Nuddea, dated Calcutta, 6th January 1865.

(Criminal Side.)

Present:

The Hon'ble C. B. Trevor, *Judge.*

SIR,—I am directed to communicate to you, the following observations of the Court in review of your Sessions Statement, for October last:—

2. With reference to your remark (marginally quoted) in your directions to the Jury, sitting on the trial of Ekramuddeen Sheikh, (Statement 5), I am directed to point out that both these points are not absolutely necessary in order to constitute a legal conviction under Sections 201, 202, or 203, of the Penal Code, for if a person have reason to believe (Section 26) that an offence has been committed, and acts in the manner described in either of those Sections, he would be liable to punishment even although it might subsequently transpire that he was mistaken in his belief.

"The two essential points which remain to be proved before a conviction can pass on any of the three Sections referred to, are—*first*, the substantial fact of an offence having been committed, and *secondly*, the knowledge or reasonable belief on the part of the accused that such was the case; both these are essential parts of the offences specified in the charges against the accused."

I am to add that Section 203 of the Penal Code, under which the offence specified in the third head of the charge was punishable, should have been entered therein in accordance with the terms of Section 234 Code of Criminal Procedure.

Abetment—Adjournment of Case (absence of Inspector of Police)—Rape (attempt to commit).

Extract (paras. 2, 3, 4 and 6) of Letter No. 12, from the Registrar of the Appellate High Court, to the Session Judge of Nuddea, dated the 6th January 1865.

(Criminal Side.)

Present:

The Hon'ble C. B. Trevor, *Judge.*

2.—That the act, with the abetment of which the prisoner Baool Chunder Biswas was charged, was not committed in consequence of the abetment, should have been specified in the charge in order to bring it within the terms of Section 116 of the Penal Code.

3. If you considered that the evidence of the Inspector of Police, (absent through sickness) was essentially material in the trial of Koylash Ghose and three others, convicted of dacoity, you should, under the circumstances, have adjourned the trial of the case under Section 377. Code of Criminal Procedure.

4. Referring to the charge against the prisoner Modhoosoodun Chowdhry, Case No. 30 of Statement 5, I am to point out that to render Section 109 Indian Penal Code applicable, it should be set forth in the charge, and proved in evidence that the act abetted was committed in consequence of the abetment. This remark applies also to the 2nd head of the charge against the prisoner, Issur Chunder Roy and another, Case No. 34 of Statement 5.

6. The 2nd head of the charge against the prisoner, Khaodee Sheikh, should have set forth that the offence was punishable under Section 511 and Section 376 of the Indian Penal Code, as the former Section by itself does not prescribe any definite punishment for the offence of attempting to commit rape.

Framing of charge under Section 211 Penal Code—Custody of recusant prosecutors.

Extract (paras. 2 and 3) of Letter No. 13, from the Registrar Appellate High Court, to the Deputy Commissioner of Cachar, dated the 6th January 1865.

(Criminal Side.)

Present:

The Hon'ble C. B. Trevor, *Judge.*

2. In accordance with the provisions of Section 234 of the Code of Criminal Procedure, the charge against the prisoner Jeebun Coolie (Case No. 10 of Statement 4) should have described the imputed offence as nearly as possible in the language of the Indian Penal Code. Following the terms used in Section 211 of the Indian Penal Code under which the charge was laid, it should have set forth that the prisoner "falsely charged," and not that he "made an accusation." The Court also observe that there was a material defect in the charge owing to the omission of the words "knowing that there was no just or lawful ground for such charge" against the accused.

3. The first and second heads of the charge against the prisoner, Brojo Kishen Deb, are, the Court observe, obviously absurd. The Assistant Commissioner should rather have framed a charge, under Section 166 of the Indian Penal Code, coupled with Section 159 of the Code of Criminal Procedure, as he should have known that rules regarding the custody of accused persons do not apply to complainants. Amendment of the charge, I am to add, would not have affected the result of the case.

The exceptions under Section 300 Penal Code should not be affirmed in a charge of culpable homicide not amounting to murder—Robbery—Hurt.

Extract (paras. 3 and 7) of Letter No. 14, from the Registrar Appellate High Court, to the Sessions Judge of Bhaugulpore, dated the 6th January 1865.

(Criminal Side.)

Present:

The Hon'ble C. B. Trevor, *Judge.*

3. Adverting to the original charge against the prisoner, Karree Roy (Case No. 5 of Statement 4), I am to point out that, in a charge of culpable homicide not amounting to murder, it was quite unnecessary to specify, the exception under which the offence fell so as not to amount to murder. The exceptions in question are a part of Section 300, and need to be *denied* in a charge of murder: they do not require to be *affirmed* (as the Joint Magistrate seems to have thought) in a charge of culpable homicide not amounting to murder punishable under Section 304 of the Penal Code. In regard to the finding and sentence in this case, the Court observe that the evidence, as given in the Sessions Court, clearly brings the crime up to culpable homicide not amounting to murder. The punishment awarded is under the circumstances sufficient, though the offence of which the prisoner was found guilty does not meet all the facts in the evidence.

7. As the crime of robbery supposes the existence of "voluntarily causing hurt or wrongful restraint," the charge against the prisoner Ameer (Case No. 12 of Statement 4) was unnecessarily amplified by the insertion of the clause just quoted. If hurt were caused in the commission of robbery, an additional head charging the prisoner with the offence punishable under Section 394 of the Indian Penal Code, should have been framed.

Rape (Previous convictions of)—Whipping.—Murder (by several persons)—Capital Sentence—Kidnapping—Abduction.

Extract (paras. 4, 7 and 8) of Letter No. 28, from the Registrar of the Appellate High Court, to the Sessions Judge of Rungpore, dated the 9th January 1865.

(Criminal Side.)

Present:

The Hon'ble C. B. Trevor and G. Loch, *Judges.*

4. The sentence passed by you on the prisoner Nuzee Nushyo (Case No. 4 of Statement 4) is altogether illegal, as you will find on a reference to Act VI of 1864, Section 4. The Court are surprised that an officer

of your experience should have been guilty of such an illegal one which is entirely beyond remedy.

If you refer to that law you will find that a *previous* conviction of rape renders the persons again convicted liable to be whipped. As there is nothing in the case to show that the prisoners had been previously convicted of rape, the sentence passed by you is utterly illegal. The Court expect that you will, in future, be more careful to observe the provisions of the law in passing sentence on persons convicted in your Court.

7. The principle enunciated by you in your remarks against the first of the two last mentioned cases, *viz.*, that where several persons are engaged in a murder, no one is to be sentenced capitally unless there is direct evidence to his having committed the murder, is not sound, for if several persons are engaged in a murder, even if it be proved by other than direct evidence, it is for the Court to endeavour to ascertain the parties most active in the crime, and to sentence them capitally, awarding to the others a secondary punishment. If it may happen in some cases that all the accused seem to the Court to be equally guilty, in such, the punishment must be left to the discretion of the Court. But the cases in which no distinction can be drawn between the guilt of the several parties charged, are comparatively few.

8. Referring to the charge against the prisoners Dharmonarain Moitro and others, (Case No. 14 of Statement 4) I am to observe that kidnapping and abduction are two distinct offences. If the Deputy Magistrate of Julpigoree was in doubt as to which of the two offences the prisoners were guilty of, he should have framed separate charges for each of the offences, in accordance with the provisons of Section 241 of the Code of Criminal Procedure.

Absence of ill-feeling and apparent motive, no ground of exemption from capital sentence in a case of murder.

Extract (para. 4) of Letter No. 39, from the Registrar of the Appellate High Court, to the Judicial Commissioner of Chotá Nagpore, dated the 11th January 1865.

(Criminal Side.)

Present:

The Hon'ble C. B. Trevor, *Judge.*

4. Referring to the first of the two last mentioned cases, the Court observe that, if you believed that the prisoner killed his wife, so that the crime amounted to murder, the mere absence of previous ill-feeling and apparent motive, do not, together, form sufficient ground for passing a sentence of secondary punishment on him. The evidence, in the opinion of the Court, goes to show that the murder was premeditated; and, if so, a capital sentence should have been passed on the prisoner.

Offences relating to coin—Framing of Charge under Section 249 Penal Code—Previous attempt at fraud with regard to coin not necessary for a conviction under Section 251—Commitment (necessity for)—Theft by servant (framing of charge under Section 381) Grievous Hurt (necessity for commitment).

Extract (paras. 4, 5, 9, and 11) of Letter No. 34, from the Registrar, Appellate High Court, to the Session Judge of Rajshahye, dated the 10th January 1865.

(Criminal Side.)

Present;

The Hon'ble C. B. Trevor, *Judge.*

4. In the 2*nd* head of the charge against the prisoner Aliff Shaw, Case No. 2 of Statement 4 (for Pubnah), the offence which had been committed in respect to the coin of which the accused was said to be in possession, should have been expressly stated. It was not sufficient to allude to it as "the offence defined in Section 249," for an allusion of this kind must have been wholly unintelligible to the accused, unless he possessed or was provided with a copy of the Penal Code, and was sufficiently educated to be able to understand it. In the additional charge framed by you in the same case, after the words "silver rupee," should have been added, the words "the appearance of the said copper double pice having been altered."*

5. Adverting to the following extract from your remarks in this case—"there must be some evidence to show that the accused is a habitual alterer or forger of spurious coin to justify a conviction under Section 251"—I am to observe that this is not absolutely necessary. The prisoner might have been guilty under Section 251 of the Indian Penal Code without having attempted such a fraud before. The remark made by you in this case, which is quoted in the margin, was hardly correct, since it was apparently a matter for great doubt whether the accused was aware of the state of the coin when he received it, and this doubt involved the necessity for commitment of the case. If you have addressed Moulvie Abdool Jubbor, Deputy Magistrate, who committed his case, on the subject, you are requested to furnish him with a copy of the foregoing remarks of the Court.

* "The alteration was so bad that it was immediately detected by the poddar, and the whole affair was so sudden that the offence is by no means very serious, and should have been disposed of by the committing officer himself."

9. With reference to the count added by the Sessions Court to the charge against Bhoobun Issur Gossamee (Case 14 of Statement 4), I am to point out that the property in the jewel or the idol was with the Sandyals, to whom the idol and building belonged, and in whose legal possession the ornaments on the idol were. The Sandyals, therefore, from whom the prisoner received wages, were in the position of the "master or employer" intended by Section 381 of the Indian Penal Code, and should have been so described in the new count, which, as it stands, would seem to place the idol in that position.

11. The Court cannot comprehend why you have termed the commitment by the Deputy Magistrate, Moulvie Ahmud, of the prisoner Omesh Chunder Bose, * "very silly and unnecessary." For although the loss of a tooth may not come under the 4th description of grievous hurt as explained in Section 320, it certainly falls under the 7th description; and as it was obviously beyond the Deputy Magistrate's competency to try the case, he was bound to commit it to your Court. Your strictures on the Deputy Magistrate's proceedings are consequently undeserved. I am further to observe that the facts, as given in your remarks, clearly show that the prisoner was properly and strictly guilty of "voluntarily causing grievous hurt" under the terms of Section 322 of the Indian Penal Code. If you have communicated your censure to the Deputy Magistrate who committed the case, I am to require that you will withdraw it.

* Case No. 16 of Statement 4.

Causing hurt in committing robbery—Section 368 Criminal Procedure Code applies only to trials before the Court of Sessions—Evidence of Medical Officers in commitments of cases regarding offences affecting the human body.

Extract (para. 2) of Letter No 42, from the Registrar, Appellate High Court, to the Sessions Judge of Beerbhoom, dated the 12th January 1865.

(Criminal Side.)

Present:

The Hon'ble C. B. Trevor, *Judge.*

2. The 1*st* head of the charge against the prisoner Nokoor Chunder Kamar (Case No. 1. of Statement 4) should have followed more closely the terms of Section 307 of the Indian Penal Code, and not the words of the marginal abstract of that Section. The second head should have charged the prisoner with voluntarily causing hurt in the commission of *robbery* and not of *theft*, since the hurt caused would convert the *theft* into *robbery* (Section 390 Penal Code), and the latter is the term used in Section 394 Penal Code under which this head of the charge was made. Section 368 Code of Criminal Procedure to which, at the conclusion of your remarks on this case, you state you have repeatedly called the attention of the *Magisterial* Officers, I am to point out, applies to trials before the Court of Sessions. It is, therefore, not apparent how it concerns the Magistrates. The Court, however, remark that you are right in requiring the Magistrates subordinate to you invariably to record the evidence of the Medical Officer before making commitments of cases regarding offences affecting the human body (Chapter XVI Penal Code), for the omission to record this evidence might very possibly lead to the acquittal of an accused in the Sessions Court if, through sickness, death, or unavoidable absence of the Medical Officer, his attendance cannot be procured before the Sessions Court.

Charges to be complete—Finding in a conviction of Culpable Homicide not amounting to murder—Kidnapping and Abduction should be charged separately.

Extract (paras. 2, 3, 4, and 5) of Letter No. 44, from the Registrar, Appellate High Court, to the Sessions Judge of Chittagong, dated the 12th January 1865.

(Criminal Side.)

Present:

The Hon'ble C. B. Trevor, *Judge.*

2. THE charge against the prisoner Mahomed Nazoo* is imperfect, inasmuch as each head of the charge should have been in itself complete. This remark applies also to the first case in Statement 5. It is not sufficient that there should, at the end of the charge, be a general reference to the various Sections of the Penal Code under which the several heads fell.

* Case No. 26 of Statement 4.

3. From your concluding remarks on the trial of prisoner Pohim, Case No. 27 of Statement 4, it is clear, that the prisoner was convicted of Culpable Homicide not amounting to murder of the description specified in the latter part of Section 304 of the Indian Penal Code. This should, therefore, have been distinctly stated in your finding in accordance with the Court's Circular Order, No. 5 of 1863.

4. The trial of Motee Bibee (No. 29 of Statement 4) has not, the Court observe, brought out all the facts of the case as satisfactorily as would have been desirable. The prisoner was charged only under Section 328 of the Indian Penal Code. It is probable that a little more energy or tact would have enabled the Magistrate to commit the prisoner on a

graver charge. As it is, she escapes with a very light punishment.

5. Referring to case No. 30 of Statement No. 5, Nizamut Ali and two others, the Court observe that, as Kidnapping and Abduction are distinct and separate offences, they should, under Section 241 of the Code of Criminal Procedure, have been charged in separate heads of the charge. In other respects, too, the charge is defective, the Committing Officer having apparently contented himself with copying verbatim Section 366 of the Indian Penal Code, without applying some particular portion of it to the case before him.

Charge how to describe Grievous Hurt by dangerous weapons or means, Abetment, and Extortion—Proceedings of Committing Officers, and Evidence of Police—Acquittal of prisoners found guilty because already punished in other cases—False information.

Extract (paras. 3, 4, 8, and 9) of Letter No. 48, from the Registrar, Appellate High Court, to the Sessions Judge of Jessore, dated the 12th January 1865.

(Criminal Side.)

Present:

The Hon'ble C. B. Trevor, *Judge.*

3. In the first head of the charge against Durusutoollah (No. 4 of Statement 4) the words "dangerous means" should not have been used. The Committing Officer, in accordance with Section 234 of the Code of Criminal Procedure, should have described the offence in the words of the Penal Code, *i. e.*, of Section 326. He should not have followed the marginal abstract. The denial of the special exception should have appeared in the body and not at the end of the charge. In the first head of the charge against Najir Mundul Chokra and another in the same case, in order to render Sections 109 and 114 of the Penal Code applicable, it should have been stated that the accused was present abetting the commission of the grievous hurt caused by Durusutoollah, and that the grievous hurt the act abetted) was caused in consequence of the abetment.

4. The first head of the charge against Moddoo Sheikh, Constable, (No. 7 of Statement 4) should have specified the name of the person from whom the prisoner intended to extort money by means of voluntarily causing hurt to Oseemuddeen. The Court observe that your predecessor has pointed out to the Committing Officer the errors and omissions in his proceedings in the preliminary enquiry in this case; but they desire me to add that, in their opinion, it would have been preferable, had Mr. Simson not overburdened his judgment with a presentation of these mistakes; a mere cursory notice of them in the judgment would have sufficed. As regards Mr. Simson's remark marginally quoted, the Court observe that the Committing Officer was quite right not to encumber the record with papers which were not legal evidence in the case. If it was necessary that the Sessions Court should be informed regarding any of the proceedings of the Police, Mr. Simson should have proceeded, under Section 367 of the Code of Criminal Procedure, to summon the proper Officers to give evidence before him.

"No Police papers "nor account of the "Police proceedings "accompanied the re- "cord. The papers "of the theft case "were not sent up, "and all particulars "of it were ascertain- "ed from the calen- "dar only."

8. If your predecessor found Bajoo Dye and two others (No. 3 of Statement 5) guilty of any of the offences charged, he should not have acquitted them merely because they had already received punishments in other cases. He should rather have found them guilty, reserving sentences until the term of appeal in the other cases had expired, for if the prisoners be released on appeal, it is not improbable that they may entirely escape punishment, although they may have been guilty in the case under decision.

9. The sixth head of the charge against Bajoo Dye (No. 5 of Statement 5) is very imperfect, for the names of the public servants to whom false information was given by the accused should have been entered. Also those of the "certain persons" to whom the accused was alleged to have intended to cause injury and annoyance by their acts.

Finding to state whether Culpable Homicide not amounting to murder was done with the intention of causing death or only with the knowledge that it was likely to cause death—Hearsay statements not admissible in evidence—Framing of charge in case of murder—Theft of property in possession of Master, and Abetment.

Extract (paras. 2, 5, and 6) of Letter No. 58, from the Registrar, Appellate High

Court, to the Sessions Judge of Backergunge, dated the 17th January 1865.

(Criminal Side.)

Present:

The Hon'ble C. B. Trevor, *Judge.*

2. Your finding in the case of Nozar, talookdar, (No. 1 of Statement 4) should not have omitted to state whether the act constituting the offence of Culpable Homicide not amounting to murder was done with the *intention* of causing death, or *only with the knowledge* that it was likely to cause death; the Court's Circular Order, No. 5 of 1863, pointing out that distinct penalties are provided by law for the same acts as above distinguished. The mere fact, that the prisoner did not *intend to kill* his wife, does not reduce the crime to Culpable Homicide not amounting to murder. The intention of causing such bodily injury as the offender knew to be likely to cause death to the person injured, or the intention of causing bodily injury where the injury when inflicted is sufficient in the ordinary course of nature to cause death, or the knowledge that the act committed is so imminently dangerous that it must in all probability cause death or such injury as is likely to cause death, &c.; each of these acts is sufficient, in the absence of the circumstances mentioned in the exceptions under Section 300 of the Indian Penal Code, to consitute the crime of murder; and looking at the circumstances of the case as stated by you, the Court is of opinion that the act coupled with the intention or guilty knowledge which is presumable from those circumstances, constitutes nothing else than the offence of murder.

5. With reference to the following remarks made by you on the trial of Kishen Mohun Chung, jemadar (Case No. 3 of Statement 4), "it remains to consider whether the *hearsay* statement of the witnesses are sufficient proof to convict the prisoner," I am to observe that hearsay statements should not have been admitted as they were not legal, and, therefore, could not amount to any proof at all. The Court are surprised that you should not have been aware of this rule.

6. To render the denial of the first exception under Section 300 of the Indian Penal Code complete in the charge of murder against Somiruddy and 3 others (Case No. 11 of Statement 4), the words "given by the deceased" should not have been omitted after the words "sudden provocation." The third Head of the charge should have set forth that the prisoners committed theft "in respect of the property in the possession of their master." Heads 5 and 7 of the charge have been incorrectly framed. As the offences with abetting with the prisoners were severally charged, were distinct, the abetment of each should have formed separate heads of the charge in accordance with the provisions of Section 240 of the Code of Criminal Procedure; while to render Section 109 of the Indian Penal Code applicable, it should have been stated in the charge and proved in evidence that the act abetted was committed in consequence of the abetment of the accused.

Failure to fulfil conditions of conditional pardon.

No. 59.

From the Registrar, Appellate High Court, to the Sessions Judge of Dinagepore, dated Calcutta, the 18th January 1865.

(Criminal Side.)

Present:

The Hon'ble C. B. Trevor, *Judge.*

SIR,—With reference to the question referred for the opinion of the Court with your memo. No. 4 of the 10th instant, I am directed to inform you that, if any person to whom a tender of conditional pardon is made under Section 209 of the Code of Criminal Procedure, upon certain conditions, does not act up to those conditions, the offer becomes null and void, and he may be committed for trial. If the failure to fulfil the conditions occurs after the offer of pardon has been accepted, and the person examined as a witness, the Court of Sessions can order his commitment; but if the failure takes place before the case goes out of the Magistrate's hands, that officer is himself competent to deal with the matter.

Oath or solemn affirmation not a sine qua non in the offence of giving false evidence—Conviction of two offences—Fines—Abetment how to be charged.

Extract (paras. 3, 5, 6, and 8) of Letter No. 85, from the Registrar, Appellate High Court, dated the 27th January 1865.

(Criminal Side.)

Present:

The Hon'ble C. B. Trevor, *Judge.*

3. Alluding to the reason given in your remarks for not having convicted the prisoner on the first count, I am to point out that an oath or solemn affirmation is not a *sine quâ non* in the offence of giving false evidence defined in Section 191 of the Penal Code. This offence may be committed by a person who, "being bound by law to make a declaration upon any subject, makes *any statement* which is false, and which he knows or believes to be false, or does not believe to be true." So that if the prisoner made such a false statement before the Registrar of Deeds, even though no oath or solemn affirmation had been administered to him, he was clearly guilty of having giving false evidence.

5. Adverting to your allusion to Circular Order No. 16, dated 20th August last, as your warrant for passing a separate sentence on each offence in this case, I am to state that the evidence to support the 2nd count is to a very great extent identical with that supporting the first; and that consequently a conviction of the two offences is erroneous, as you will see by a perusal of Rule 3rd of the Circular in question. As, however, the sentence of 2 years' rigorous imprisonment is not excessive for either offence, it can stand.

6. With reference to your sentences in the cases of Rajbunsia, (Case No. 7) and Mussamat Rujjul Kooer, (Case No. 8), I am to inform you that fine should not be made part of a sentence for crimes for which imprisonment is obviously the more proper punishment, and in cases like those mentioned in which they cannot be paid.

8. In the second count of the charge against Mukkoo Panday (Case No. 12), it should have been stated that the act abetted was committed in consequence of the abetment, in order to render Section 209 of the Penal Code applicable. This should also be proved in evidence.

Using, and attempting to use, false evidence, how to be charged—Grievous hurt and abetment—Abetment to be charged separately.

Extract (paras 2, and 3) of Letter No. 94, from the Registrar, Appellate High Court, dated the 30th January 1865

(Criminal Side.)

Present:

The Hon'ble C. B. Trevor, *Judge.*

2. With reference to the case of Treluck Chunder Deb (No. 3 Statement No. 4), I am to point out that "using" and "attempting the use" false evidence, &c., are two distinct and separate offences, and should, under Section 241 of the Code of Criminal Procedure, have been charged in separate heads of the charge. I am further to observe that, as the offences charged are not punishable under Section 193 of the Penal Code without the application of Section 196, both Sections should have been entered in the charge. Adverting, however, to the narrative of the case given in your judgment, it is clear to the Court that the prisoner should have been convicted of *using*, and not of *attempting to use*, evidence which he knew to be false or fabricated. If you were in doubt as to the precise offence committed, you should have adopted a form of finding of the alternative nature of the model supplied in Clause 11 Section 382 of the Code of Criminal Procedure.

3. With reference to the case of Goburdee and 3 others (No. 4 of Statement No. 4), I am to point out that the inclusion of an act (voluntarily causing grievous hurt, &c.,) and its abetment under the same head of the charge is opposed to Section 240 of the Code of Criminal Procedure. Besides which abetment of grievous hurt is punishable not un-

der Section 326 of the Penal Code, the Section cited in the first count of the charge. Abetment of an act, the Court observes, does not necessarily subject the offender to the punishment for the offence abetted, as the Deputy Magistrate and yourself will find on a reference to Chapter V of the Indian Penal Code; and if abetment be charged, it should not only be charged in a separate head of the charge, but should be described in order that the peculiarities of the abetment may appear. The above remarks apply also to the 2nd and 3rd heads of the same charge.

Culpable Homicide not amounting to Murder (Direction to and finding of Jury)—Altering appearance of Coin how to be charged—Summoning of Police as Witnesses—Difference between Murder and Culpable Homicide not amounting to murder.

Extract (paras. 2, 4, 7 and 8,) of Letter No. 95, from the Registrar of the Appellate High Court, dated the 30th January 1865.

(Criminal Side.)

Present :

The Hon'ble C. B. Trevor, *Judge.*

2. With reference to the case of Jassaora (Case No. 45 of Satement 4), the Court request that, in future, when convicting any person under trial before you of Culpable Homicide not amounting to murder, you will be careful to specify in your directions to the Jury, and to require them to specify in their finding, under which of the exceptions described in Section 300 of the Penal Code the offence fell. Similarly, to enable you to fix the degree of punishment to be awarded, the Jury should be required to state the description of Culpable Homicide not amounting to murder of which they convict the accused, as a reference to Sections 299 and 304 of the Penal Code, and to the Court's Circular No. 6 of 1863, will show you the necessity of being precise on this point.

4. The amended charge against Dong Garo (Case No. 50 of Statement 4) is not sufficiently explicit. Every charge should be so worded as to be in itself thoroughly intelligible to an accused; and the charge, therefore, should have stated that an operation had been performed on the coin, which altered its appearance. Reference to Section 248 of the Penal Code was not sufficient.

7. If in the case of Hattiram and two others (Case No. 53 of Statement 4), you thought that it should be established clearly in evidence, on what grounds suspicion attached to Andarao, you were, I am to remind you, fully authorised, under Section 367 of the Code of Criminal Procedure, to summon the Police to satisfy you and the Jury on this point.

8. As from your directions to the Jury in the case of Dheenai (Case No. 49 of Statement 5) it is not clear that you fully understand the difference between Culpable Homicide amounting to murder and Culpable Homicide *not* amounting to murder, the Court think it necessary to point out that, under the Penal Code, all acts by which death is caused, done with certain knowledge or intention (*see* Section 300), constitute Culpable Homicide amounting to murder. Culpable Homicide *not* amounting to murder is death caused with the same knowledge or intention, but under one of the exceptional circumstances specified in Section 300 of the Penal Code. If the particular knowledge or intention exist, and the case does not fall under any of those exceptions, the crime is murder. If, however, as in the case under consideration, this knowledge and intention are both wanting, and death is caused by an act which is not justifiable under the Penal Code, the offender should be convicted of the minor offence of voluntarily causing grievous hurt (Section 325 of the Penal Code). As far as the Court are able to judge from your directions to the Jury, the Court think that the prisoner Heenai should have been convicted and sentenced under Section 325 of the Penal Code.

Robbery how to be charged—False evidence—Examination of accused person—Abetment of Forgery, and Abetment generally.

Extract (paras. 6, 7, and 8, of Letter No. 97 from the Registrar of the Appellate High Court, dated the 2nd February 1865.

(Criminal Side.)

Present :

The Hon'ble C. B. Trevor, *Judge.*

5. As regards the case of Shoodaram *alias* Shooda Nund Deb (Case No. 41 of Statement 5), it was not necessary, the Court observe, to enter in the charge the words "by violently taking away a basket from Ramkishub Surmah." If it were desired to describe the nature of the violence committed, the description should have been expressed in the legal language of Section 390 of the Indian Penal Code.

6. The charge under Section 193 of the Penal Code, against Beldar Nath (Case No. 43 of Statement 5), should have contained the word 'intentionally' before "gave false evid-

ence," as this is a *very material point* in such charges. Alluding to your remark in this case that "the point on which the prisoner is said to have perjured himself is not *at all material to the issue of the case*," I am to observe that, although this was a *sine qua non* under the old law, it is by no means necessary to constitute a proper conviction under Section 193 of the Penal Code, as you will find on a closer examination of the definition of false evidence given in Section 191.

7. With reference to your censure of the proceedings of the Moonsiff of Phenchoogunge in the commitment made by him, I am to observe that it is not absolutely necessary that an accused person should be examined before he is committed for trial, though, as a rule, such a course is expedient and should be followed as laid down in Circular Order No. 13, dated 28th July last. You are requested to forward to the Court the explanation which you have called for from Baboo Nobin Chunder Gangooly.

8. Attending to the charge against Mahomed Hossen and three others (Section 44 of Statement 5), I am to point out that abetment of Forgery is not punishable under Section 468 of the Penal Code alone, but under that Section applied to the case by some provision of Chapter V upon abetments. It is not, I am to add, every degree of abetment that subjects the abettor to full punishment for the substantive offence, so that it is the more necessary there should be preciseness in the description of the abetment.

Form of Charge of murder—Jail Delivery Statements.

No. 105.

From the Registrar of the Appellate High Court, dated the 3rd February 1865.

(Criminal Side.)

Present:

The Hon'ble C. B. Trevor, *Judge.*

SIR,—I AM directed to acknowledge the receipt of your letter No. 15, dated the 18th ultimo, and in reply to observe as follows:—

2. Alluding to the inconsistency pointed out in your 2nd paragraph between the Court's instructions as to the proper form to be observed in a charge of murder and the model form furnished in Section 243 of the Code of Criminal Procedure, I am to remark that the forms of charges in that Section are most incomplete, and do not fulfil the condition required in Section 237 Act XXV of 1861, which it obviously could not be the intention of the Legislature to set aside simultaneously with its enactment.

3. In reply to your 3rd paragraph, I am to state that you are right in considering that, in such cases, it is not necessary that grave and sudden provocation should have been given by the deceased; and you are requested to consider, as cancelled, the observations in this respect contained in paragraph 3 of my letter 1118, dated 28th December. But, I am to add, you are wrong in supposing that it would be supererogatory to refer the provisoes to Exception 1 Section 300 of the Indian Penal Code, for the law has enjoined (Section 237 of the Code of Criminal Procedure) that the existence of any of the special exceptions should always be denied when the Section referred to in the charge contains such exceptions, and those exceptions are not formally and correctly stated unless the provisoes limiting them are stated also. The directions of the Court on this point were therefore quite correct.

4. As regards paragraph 7 of your letter, the Court is glad to find that your conclusions have, in two cases, been confirmed in appeal; but as all cases are not appealed, it is necessary that the Jail Delivery Statements should contain a clear and succinct detail of the main facts elicited from the evidence, with a view to enabling the Judge who peruses them to determine on the correctness or otherwise of the conviction of, and sentence passed on, the prisoners, and to exercise the powers of revision conferred by Chapter XXIX of the Code of Criminal Procedure.

Commission of the same act at more than one place constitutes more than one offence—Unsatisfactory investigation—Admission of unproved letters as evidence—Punishment for Dacoity.

Extract paras. (2, 7, 8, *and* 10,) *of Letter No.* 115, *from the Registrar of the Appellate High Court, dated the 6th February* 1865.

(Criminal Side.)

Present:

The Hon'ble C. B. Trevor, *Judge.*

2.—In the first, second, and fifth heads of the charge against Sudanund Dass *alias*

Sonai Biswall (Case No. 1 of Statement 4), it is evident that there is more than one offence charged, since the accused is charged with having committed the same act at more than one place. Under such circumstances, each act should have been charged under a separate head; and on conviction, the prisoner would be liable to a separate sentence for each act, due regard being paid to Section 71 of the Penal Code.

7. The Court observe that the investigation in the case mentioned in the last preceding paragraph was very unsatisfactory, as it is evident that full enquiry was not made into the offences charged, and neither by the Magistrate nor before you have the facts of the case been brought out by evidence as they should have been. The Committing Officer should have taken the evidence and procured the attendance at the Sessions Court of Sadhoo and other witnesses; but you had nevertheless full power, under Section 367 of the Code of Criminal Procedure, to summon them if (as apparently you did) you thought their evidence was material to a proper decision of the case.

8. The admission of the letter alleged to have been written by Sudderee Mall in the same case was improper, as that letter would be no evidence in the case unless Sudderee Mall was examined by you. The Court trust that you will not again exhibit such ignorance of the Law of Evidence as to take an unproved letter as evidence, without subpœnaing the writer of it and examining him orally as to the facts contained therein.

10. The sentence of ten years' transportaction, passed under Section 395 of the Penal Code on the prisoners in the case last mentioned, was not correct, as a sentence af transportation, awarded under Section 395 of the Penal Code, cannot be except for life. The proper course would have been to have sentenced the accused to rigorous imprisonment under that Section, and you should then, under Section 59 of that Code, have altered it to trasportation.

Police Diaries unless authenticated by deposition on oath are not legal evidence.

Extract (para. 6 of letter No. 116, from the Registrar, of the Appellate High Court, dated the 6th February 1865.

(Criminal Side.)

Present:

The Hon'ble C. B. Trevor, *Judge.*

6. In the charge against Gyanu Halwaie (Case No. 4 of Statement 5), the exceptions under Section 300 are enumerated very loosely, and the wording of the charge is, therefore, most imperfect. The preliminary enquiries held in this case appear to have been most unsatisfactory. The Court request you will send a copy of your judgment to the Commissioner and to the superior Police authorities for their information. I am to point out, however, with reference to your judgment, that, unless authenticated by the deposition on oath of a Police officer cognizant of the facts therein related, "the thanna papers" (Section 154 of the Code of Criminal Procedure) are no evidence, and that you should not have perused them on the trial so as to give them the weight of legal evidence. You should rather have proceeded, under Section 357 of the Code of Criminal Procedure, to summon any witnesses necessary to explain what had been done or said when the case was in the hands of the Police.

Kidnapping and abduction should be charged separately.

Extract (para. 4,) of letter No. 117, *from the Registrar of the Appellate High Court, dated the 6th February* 1865.

(Criminal Side.)

Present:

The Hon'ble C. B. Trevor, *Judge.*

4. Adverting to the 2nd count of the charge against Mussamut Bhuggut Cooer and others (Case No. 6), I am to point out that Kidnapping and Abduction, being distinct and separate offences, should have been charged under separate heads as required by Section 241 of the Code of Criminal Procedure.

Immediate levy of fines.

Extract (para. 4,) of Letter No. 134, from the Registrar of the Appellate High Court, dated the 10th February 1865.

(Criminal Side.)

Present:

The Hon'ble C. B. Trevor, *Judge.*

4. The order to the Magistrate directing him to abstain from levying any portion of the fine imposed on the prisoner, till the period for appeal shall have expired, or until the orders of the High Court are received on an appeal that may be preferred, is er-

roneous, as there is nothing in the law which forbids the immediate *levy* of a fine. A Criminal sentence should be forthwith carried out in its entirety as far as the law permits.

Written reports of Medical Officers, and records of another case, are not legal evidence—Depositions of complainants and accused persons.

Extract (paras. 3, 4, and 5) of Letter No. 135 from Registrar of the Appellate High Court, dated the 10th February 1865.

(Criminal Side.)

Present:

The Hon'ble C. B. Trevor, *Judge.*

3. Reference in the case of Mahomed Batur *alias* Batur Meah (Statement No. 4) to the written *reports* of the Medical Officer was improper, as such reports were not legal evidence. It does not appear why you alluded to these reports, as the Medical Officer was examined in the case, and substantiated on oath what he had before only committed to writing.

4. Further the record of the assault case should not have been called for and considered by you in the trial of Mahomed Nazir (Statement No. 5) as it was not legal evidence in that case.

5. The Court are not satisfied at the manner in which the case of Mahomed Sagur (Statement No. 5) was conducted. As remarked by you, the Magistrate, on receipt of the petition said to have been presented by the accused, should have recorded his deposition regularly; but as this was not done, if you had doubts as to the genuineness of the deposition said to have been delivered by the accused, you should have summoned the Constable who recorded it as a witness before you. The case was not apparently thoroughly enquired into by you before acquitting the prisoner. You are requested to point out to the Magistrate the irregularity committed by him, and that, under Section 66 Code of Criminal Procedure, the deposition of a complainant should invariably be recorded by a Magisterial Officer soon after the complaint has been made, and in one of the modes of procedure described in Circular Order 6 of 1864.

A charge of House Trespass cannot be compounded.

No. 181.

Resolution of the High Court of Judicature at Fort William in Bengal, under date the 20th February 1865.

Present:

The Hon'ble C. B. Trevor and the Hon'ble G. Loch, *Judges.*

READ a letter No. 13, dated 6th February, from the Sessions Judge of Bhaugulpore, submitting, under Section 434 of the Code of Criminal Porcedure, the case of Dookha Hulwai *versus* Nuthoo Mahoot, that the order of the Deputy Magistrat , dated 8th December 1864, permitting the withdrawal of the prosecution may be cancelled as illegal.

The Deputy Magistrate in his judgment, has acted under the erroneous impression that the offence charged (House Trespass, Section 448 of the Penal Code) consists only of an act irrespective of the intention of the offender, and, therefore, is within the exception specified in Section 214 of the Penal Code.

House is Trespass defined, in Section 442 of the Penal Code, to be the commission of Criminal Trespass by entering into or remaining in any building, &c., used as a human dwelling, &c., &c.; and Criminal Trespass is defined by Section 441 of the Penal Code to be the entering into or upon property in the possession of another *with intent* to commit an offence or to intimidate, &c., or (after the lawful entry into or upon such property) the unlawful remaining there *with intent* thereby to intimidate, &c., &c. It is the *criminal intent* which is the principal ingredient in the offences of Criminal Trespass and House Trespass. Moreover, as the compromise or withdrawal of a Criminal prosecution is permitted only by Section 271 of the Code of Criminal Procedure in cases falling under Chapter XV of that Code, and as House Trespass, which is punishable with imprisonment for one year, does not fall under that Chapter, a charge for that offence cannot be compounded.

The Court agree with the Judge as to the illegallity of the Deputy Magistrate's order, dated 8th December last, and, cancelling it, direct that he proceed with the trial of the accused Nuthoo Mahoot.

The original record of the case is returned.

Charge of theft and Criminal Breach of Trust how to be framed.

Extract (para. 2) of Letter No. 203, from the Registrar, Appellate High Court, dated the 7th March 1865.

2. IN the charge against Mirtoonjoy, Tin Mistry (Case No. 1 of Statement 4), the first head should have been sub-divided into two heads, one charging the prisoner with theft of Mr. Bell's private property, the other with theft of property belonging to the Jullinga Tea Company of which Mr. Bell was Manager. The first head of the charge should have been framed thus: That he, between the months of February and October last at Jullinga in Cachar, *being a servant of Mr. Bell*, committed theft by stealing about five hundred rupees worth of property *in the possession of his master Mr. Bell, &c.*, in the words given in Column 9. The words underlined, you will observe, are very material and have been omitted in the charge on which the prisoner was tried. The actual possession is very material in a charge of *Theft*, as it constitutes the difference between Theft and Breach of Trust. The second head of charge should have been similar to the first, but referring to the Tea Factory instead of to Mr. Bell. In what was the second head of the charge upon which the prisoner was tried, the Court observe that the following words were omitted—"*he, being a servant, and being in such capacity entrusted with dominion over property worth* 500 *rupees,*" committed a Criminal Breach of Trust with respect to "*that property.*"

Revival of charge of disobedience of orders by a Court of Justice.

Extract (para. 2) of Letter No. 269, from the Registrar of the Appellate High Court, dated 31st March 1865.

(Criminal Side.)

The Hon'ble C. B. Trevor, *Judge.*

2. YOUR reference, which is legitimate only under Section 2 Regulation X of 1796 (by which law you should be guided in dealing with such matters), and not under Circular No. 17, dated 17th June 1863, has been caused chiefly by the use of an inappropriate term by you, *viz.*, the term "condoning." All that you meant, the Court apprehend, was that, when once a Court of Justice has, by an order like that alluded to at the end of the 4th paragraph of your letter under notice, impliedly expressed itself satisfied that no disobedience of orders has occurred, it cannot revive that charge of disobedience of orders simply because, on a subsequent date, an accident has happened, which gives ground for the opinion that the order of the Court had really not been properly carried out. Your opinion appears to the Court reasonable, and founded on common sense, and legal principle, and any contrary doctrine would be attended with inconvenient results.

Charge of Murder how to be framed—Administering a drug with the knowledge that it was likely to cause death.

Extract (paras. 2 and 3) of a Letter No. 270, from the Registrar of the Appellate High Court, dated 31st March 1865.

(Criminal Side.)

Present:

The Hon'ble C. B. Trevor, *Judge.*

2. THE wording of the charge in the case of Ameerun Bewa (Case No. 1) is essentially defective, inasmuch as it omits all mention of the fact of *death having been caused.* The prisoners should have been charged with committing murder "by causing the death of" Jungly Sheikh, &c., as provided in the model form in Section 243 of the Code of Criminal Procedure. The charge is further defective in that the denial of Exception No. 1, (Section 300 of the Indian Penal Code) contains no allusion to the provisoes specified under the Exception.

3. I am to add that the finding, which was professedly one of "Culpable Homicide," was really one of murder, for if the prisoner caused the death of Jungly by administering a drug *with the knowledge that it was likely to cause death* (as stated in the verdict of the Jury), she clearly committed murder as defined in the Penal Code, unless she could successfully plead one or other of the exceptional circumstances specified in Section 300 of the Penal Code.

Charge of Forgery how to be framed.

Extract (para. 5) of Letter No. 277, from the Registrar of the Appellate High Court, dated the 3rd April 1865.

(Criminal Side.)

Present:

The Hon'ble C. B. Trevor, *Judge.*

5. THE 1*st* and 3*rd* heads of the charge against Moha Deb Chuckerbutty (Case No. 6 of Statement No. 5) have been drawn up in disregard of the provisions of Section 241 of the Code of Criminal Procedure, under which the forgery of *each* of the two documents with the forgery of "both or one" of which the accused was charged, should have formed a separate head of the charge. A similar remark applies also to the second head of the charge in this case This second head, moreover, should have charged the accused with an offence punishable under Section 466 and Section 477 of the Penal Code, as the latter Section does not, by itself, prescribe any specific punishment which, on conviction, can be awarded

Transportation under Section 395 of the Penal Code (Dacoity).

Extract (para. 5) of Letter No. 297, from the Registrar, Appellate High Court, dated the 12th April 1865.

5. In regard to prisoner No. 2, Asmut Chowkedar, (Case No. 4, Statement No. 4) on whom you have passed a sentence of 8 years' transportation; I am to observe that you cannot, under Section 395 of the Penal Code, pass sentence of transportation otherwise than for life. You should have sentenced him under Section 395 of the Penal Code to rigorous imprisonment for 8 years, and then under Section 59 of the Penal Code have converted this rigorous imprisonment into transportation.

Punishment for two offences on the same facts—Reference of cases to Magistrate instead of to the Sessions Judge.

Extract (paras. 4 and 8) of Letter No. 299, from the Registrar, Appellate High Court, dated the 12th April 1865.

4. I am to point out that, as the evidence on which the prisoner Kazim Sheik (Case No. 2, Statement No. 4) has been convicted on the 3rd head of the charge has been used by you to prove also the object of the Criminal Trespass charged in the first count, the prisoner is punished for two offences including the same facts. This is not proper and, therefore, the sentence of rigorous imprisonment of 3 months for each offence passed upon him is irregular; but as that sentence, in the aggregate, is not excessive if the prisoner had been convicted of only the 1st head of the charge, it may stand.

8. The Court request that you will inform the Assistant Magistrate who committed the accused Jadub Chowkedar (Case No. 40, Statement No. 5) that, although he may have the power to commit the accused, yet in a case which is beyond his jurisdiction as a Judicial Officer, but within that of the Magistrate of the District, he should refer it for trial to that Officer and not to the Sessions Judge, as the procedure adopted by him, though strictly legal, should, as much as possible, be avoided, as it takes up unnecessarily the more valuable time of the Sessions Judge.

Absence of eye-witness to a murder does not justify remission of Capital Sentence.

Extract (para. 3) of Letter No. 300, from the Registrar, Appellate High Court, dated the 12th April 1865.

3. With reference to your remark that, "in consideration of there having been no "actual eye-witness to the murder, I think "it right to remit the punishment of death, "and to sentence the prisoner to transpor-"tation for life," the Court observes that this by no means justifies the remission, for on this ground no capital sentence would ever be passed on a prisoner convicted on circumstantial evidence; and as persons intent on committing murder generally watch for an opportunity when there is no eye-witness to their act, capital punishment would, though sanctioned by law, soon, on your reasoning strictly carried out, become obsolete. The Court desire me to request that you will not import into Criminal Law notions inconsistent with common sense and opposed to all precedents, for a murder, if clearly proved, whether by direct or circumstantial evidence, should ordinarily be punished with death.

Object of allusions to second Sections in a charge—Charge how to be worded in such cases.

Extract (paras. 2 and 3) of Letter No. 320, from the Registrar of the Appellate High Court, dated the 21st April 1865.

2. In the *first* count of the charge against Raj Chunder Dass (Case No. 3, Statement No. 5), it was unnecessary to refer to Section 470 of the Indian Penal Code, which merely defines "a forged document;" and similarly in the third count it was unnecessary to allude to Section 192, which merely explains what constitutes "fabricating false evidence." When a second Section is coupled with that under which the charge is primarily laid, the object is either to specify distinctly the *punishment* to which the first

Section makes only a general allusion, or to render intelligible the *offence* charged or to set forth clearly the nature of a *previous conviction*. But no intelligible purpose can be served by allusions to Sections which merely define terms. Indeed, if such allusions were permitted, not only might a charge be filled with irrelevant matter, but it would, in order to be understood, require such a minute and complete acquaintance with the Code as can rarely be presumed in the case of any accused person.

3. The *second* count of the charge in the same case has, the Court observe, been laid *primarily* under Section 468, while no mention is made of the offence alluded to in that Section, *viz.*, that of forgery *with the intent to use the forged document for the purpose of cheating*. The offence actually charged is that punishable under Section 471; and if (as would seem to be the case) Section 468 is alluded to with a view to specify the punishment to which liability is incurred, the charge should have contained the words "punishable under Section 471 coupled with Section 468," which order of allusion has been inserted in the charge.

Murder—Framing of charge—Abetment.

Extract (para. 2) of Letter No. 325, from the Registrar of the Appellate High Court, dated the 21st April 1865.

2. THE *first* head of the charge against Jan Mahomed and Kanoo Gazee (Case No. 1) has been very imperfectly drawn up, inasmuch as the first four exceptions to Section 300 of the Penal Code have been only partially recapitulated. The decree of abetment charged in the *second* head against both these prisoners, should have been specified as it is not every degree of abetment that renders the abettor liable to the full punishment for the offence abetted.

Conviction under Sections 454 and 380 of the Penal Code prohibited—Written statements recorded by the Police of the examinations taken by them are not admissible in evidence.

Extract (paras. 5 and 7) of Letter No. 340, from the Registrar of the Appellate High Court, dated the 24th April 1865.

5. As the charge entered in Case No. 7, Statement No. 4 Musst. Mina Nuzurbhatia and another does not contain more than one head, and the finding alludes to two, the Court presume that the charge has not been fully transcribed in the Statement, and they request that you will forward a correct copy of the charge and finding. The conviction of the accused under Sections 454 and 380 of the Penal Code is, moreover, improper and opposed to Circular Order No. 16, dated 20th August last. As the sentences, however, in the aggregate, are not excessive the Court allow them to stand. The Court consider your judgments to be generally too meagre. What is required is such an *outline* of each case as will enable the Court to see that there is proper and sufficient evidence to justify the final order passed.

7. In conclusion, I am directed to draw your attention to the latter part of Section 145 of the Code of Criminal Procedure, as it has apparently been directly disobeyed in the case last mentioned, inasmuch as you have admitted on the record, and treated as evidence, written statements recorded by the Police of the examinations taken by them.

False evidence not necessary to be on a point material to the issue of the case.

Extract (para. 5) of Letter No. 341, from the Registrar of the Appellate High Court, dated the 24th April 1865.

5. THE Court think it necessary to point out that the false evidence with which Chattor Dass Chung was charged was not given on oath, but on solemn affirmation taken instead of an oath; and further that you are wrong in your judgment in supposing that it is essential that it should have been on some point material to the issue of the case before the Deputy Collector.

Voluntarily (not willingly) causing hurt.

Extract (paras. 3 and 4) of Letter No. 342 from the Registrar of the Appellate High Court, dated the 24th April 1865.

3. IN the charge in the case last mentioned, the Court also observe that '*willingly*' does not express the meaning conveyed by '*voluntarily*' (Section 39 of the Penal Code) which should have been used in the charge, inasmuch as it is the term conveyed in Section 323 of the Penal Code. The Court further notice that the requirements of Section 237 of the Code of Criminal Procedure, and Circular Order No. 6, dated 11th March 1863, have

been disregarded in these cases, as it has not been stated that the hurt was caused without grave or sudden provocation. These last remarks are also applicable to the case of Kassim Ally (Case No. 7 of Statement No. 4.).

4. In the charge against Bindabun Jullen (Case No. 8 of Statement No. 4) it should have been stated that the *dâo* was an instrument of one of the descriptions mentioned in Section 326 of the Penal Code.

Amendment of charge—Unlawful Assembly—Grievous Hurt—Charge and finding should correspond—Culpable Homicide—Abetment—Offences relating to Coin.

Extract (paras. 3, 4, 5, 9, 12, and 13) of Letter No. 344, from the Registrar of the Appellate High Court, dated the 24th April 1865.

3. WITH reference to Mr. Tucker's remark in the same case, that he did not consider it advisable to alter the calendar, although he thought that the prisoner should have been charged under Section 307 of the Penal Code, the Court observe that he should have exercised the authority vested in him under Section 244 of the Code of Criminal Procedure.

4. The same head of the charge against Bholaye and Noyan (Case No. 2 of Statement No. 4) is very incorrectly drawn up, for, in order to render the accused subject under Section 149 of the Penal Code to the punishment prescribed in Section 326, it was necessary only that they should be members of an unlawful assembly at a time when some other member voluntarily caused the grievous hurt, &c. If they themselves caused the grievous hurt as the charge would appear to indicate, Section 149 would be inapplicable, inasmuch as it would be immaterial whether they were or were not members of an unlawful assembly, for such association would not enhance the punishment.

5. Although the charge against Lall Sheriff and others (Case No. 4 of Statement No. 4, and the finding both quote the words of Section 333 of the Penal Code correctly, yet, as they refer to different portions of that Section, they do not correspond as they should have done, but relate to different offences, for, under Section 382 of the Code of Criminal Procedure, a prisoner, when convicted, should be found guilty "of the offence specified in the charge," and not of some other offence mentioned in the same Section of the Penal Code, and not precisely that with which he has been charged.

9. The Court observe, with reference to the finding in the same case "that the offence fell within Exception 4 Section 300 of the Penal Code, as it was committed during a *sudden fight*;" that, if villagers, in consequence of trespass of cattle, deliberately arm themselves for the purpose of turning out the trespasser, it is impossible to say that a life taken under these circumstances is taken "without premeditation in a sudden fight, or in the heat of passion or a sudden quarrel." There may, in the case, have been the heat of passion and a sudden quarrel originally; but the sudden fight without premeditation is absent. It is a fight after the villagers had armed themselves with a considerable degree of premeditation, and met on the scene of the original trespass. The sentence, therefore, passed upon the prisoners is insufficient under the law, and inadequate to the offence which they have committed. The Court further observe that the *latter* part of Circular Order No. 5, dated 6th February 1863, has been disregarded in this case also.

12. The first head of the charge against Armut Ali Khan (Case No. 12 of Statement No. 5) should have been sub-divided, and the abetment of each of the offences should have formed a separate head of the charge.

13. In the second head of the charge in the case of Mûsst. Mukhonee and another (Case No. 13 of Statement No. 5) the Court notice a very material omission of the fact that the accused knew, at the time when they became possessed of such coin, that such offence had been committed with respect to it.

Murder (Premeditation)—Evidence (in another trial against prisoner's brother)—Abetment "by his presence"—Form of charge (in a case of dishonestly receiving stolen property acquired by Dacoity).

Extract (para. 4, 5, 6, and 7,) of Letter No. 352, from the Registrar of the Appellate High Court, dated the 24th April 1865.

4. THE Court consider that your reasoning in the case of Ram Sahai Aheer and another (Case No. 3, Statement No. 4,) to the effect that the offence committed amounted to murder, but that it was not coupled with that amount of premeditation which would render a capital sentence necessary, is opposed to the law; and they, therefore request that you will, in future, abstain from calculating what amount of premeditation is necessary for a capital sentence being passed on a convicted murderer.

5. With reference to the last paragraph of your remarks in the case of Naissal Pandey, (Case No 7 of Statement No. 4), in which you allude to the evidence in the former trial, I am to point out that the evidence in a former trial against the prisoner's brother was not legal evidence against the prisoner himself.

6. With reference to the first head of the charge in the case noted in the margin, * the Court observe that the words "abetment by his presence" should not have appeared, because, by Section 114 of the Penal Code, in a bettor present when the offence is committed is deemed to have committed such act or offence.

* Shew Churn Doss, Case No. 5. Thakoor Aheer, Case No. 6. } Statt. No. 5.

7. The charge against Ram Churn Aheer (Case No. 12 of Statement No. 5) should have been drawn up thus:—"That he, on or about the 5th day of October 1864, at ———— dishonestly received *stolen property, the possession of which he knew, or had reason to know, had been transferred by the commission of dacoity*, and that *he has thereby committed an offence*," *&c.*

Grievous Hurt—Form of charge—Abetment.

Extract (para. 4) of Letter No. 353, from the Registrar of the Appellate High Court, dated the 24th April 1865.

4. WITH reference to the directions given by your predecessor to the Jury in the case, that "it is necessary to constitute the offence (causing grievous hurt) that the wound should be inflicted with an instrument which, used as a weapon of offence, is likely to cause death," the Court observe that it is not at all necessary either as regards the charge or the law; and that it was sufficient in this case to show that the grievous hurt was voluntarily caused by the accused by means of an instrument for cutting. The Court, moreover, do not understand with what object Section 114 of the Penal Code was read out to the Jury, as that Section does not contain a definition of abetment. Section 107 of the Penal Code was the proper Section for that purpose.

Procedure in case of contradictory statement made on solemn affirmation.

Extract (para. 7) of Letter No. 354, from the Registrar of the Appellate High Court, dated the 24th April 1865.

7. ALL the prisoners in the case of Ugger Roy and others (Case No. 8 of Statement No. 5) made contradictory statements on solemn affirmation, before the Joint Magistrate; and you hold that the mere fact of such self-contradiction is quite insufficient to support a charge of intentionally giving false evidence, and quote the late Sudder Court's No. 364 (Circular Memarandum No. 12) dated the 12th May 1862. The Court observe that the Circular in question does lay down that the mere making two contradictory statements did not amount to the giving of false evidence under *the Penal Code*; but that under the law it *must* be proved—1*st*, that the statement made is false; and 2*nd* that the party making it, either knew or believed it to be false, or did not believe it to be true. I am to draw your attention, however, to the corres-

pondence circulated with the High Court's Circular Order No. 10A, dated 18th April 1863, which, though it does not dispute, or in any way touch, the previous ruling, lays down that, when two statements have been made on oath, and there is no doubt in the mind of the Committing Officer as to which is the false one, the indictment should contain two heads of charge under Section 242 of the Code of Criminal Procedure, framed in accordance with the model form laid down in Section 243 of the same Code; one charging the first statement to be false, and the other charging the second statement to be false. If, on the trial the Sessions Judge of Jury cannot, upon the evidence, say which statement was false, there should be a special finding accordingly under Clause 5 Section 382 of the Code of Criminal Procedure, provided the Sessions Judge or Jury is satisfied from the evidence that the prisoner knew that one of the statements was false when he made it, and in that case the prisoner would be liable, by virtue of Section 72 of the Penal Code, to be punished under Section 193 of that Code. The Court direct me to point out to you that if there seemed to be doubts in this case as to which statement was false, you should have amended the indictment, and proceeded in the exact method laid down in the Circular last quoted.

Being arrested with stolen property—The term "Plundering" not used in Penal Code.

Extract (paras. 2 and 6) a letter No. 357, *from the Registrar of the Appellate High Court, dated the* 24*th April* 1865.

2. THE second head of the charge against Cassy Mall (Case No. 2 of Statement No. 4) not only does not correctly describe the offence punishable under Section 412, but specifies what is no legal offence at all, for the mere fact of *being arrested with stolen property* does not render any one an offender under the Penal Code. The Court are surprised that you did not amend this charge under the power vested in you by Section 244 of the Code of Criminal Procedure.

6. In the case of Jogo Bowry (Case No. 5 of Statement No. 4) the Court direct me to point out that the term 'plundering' is not used in the Penal Code, and consequently should not have appeared in the charge against the accused, as you will find by reference to Section 234 of the Code of Criminal Procedure, that the charge should "describe "the imputed offence as nearly as pos-"sible in the language of the Indian Penal "Code."

Rioting—Charge of, how to be framed.

Extract (para. 3) of letter No. 361, *from the Registrar of the Appellate High Court, dated the* 25*th April* 1865.

3. IN the second head of the charge against Habil Mundul and others (Case No. 1 of Statement No. 5) the Committing Officer should be informed that it would have been sufficient to have charged the prisoners with rioting; but if he proceeded to describe the offence, he should have been careful to describe it *fully*, and not to omit a most important point *viz.*, that the violence was committed in prosecution of the common object of the assembly.

Ministerial Officers drawing less than 50 Rs. per mensem to travel in "intermediate" Class Railway Carriages.

CIRCULAR No. 1.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to the Civil and Criminal Authorities in the Lower Provinces, dated Calcutta, the 8th February 1865.

(Civil Side.)

Present:

The Hon'ble C. B. Trevor, *Judge*.

In continuation of the late Sudder Court's Circular Order No. 29, dated 2nd December 1859, all Judicial Officers are hereby informed that the Government has ruled* that, in places where the Railway Companies have introduced the use of the new "intermediate" class of carriage, Ministerial Officers drawing less than 50 rupees per mensem shall be allowed to travel in that class, instead of in third class carriages.

* *Vide* Government Circular No. 526, dated 26th January 1865.

Annual Statements called for regarding Stamp Fees, and the expense to Government for each description of Court.

CIRCULAR No. 2.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to the Civil Judges in the Lower Provinces, dated the 13th February 1865.

(Civil Side.)

Present:

The Hon'ble C. B. Trevor, *Judge*.

The Court request that Statements in the form hereto annexed may be submitted to them as soon as possible, and these Statements be henceforth considered as *Annual* Statements.

Statements A and B should shew the information regarding Stamp Fees, and the expense to Government for each description of Court separately.

A.

Return exhibiting the Stamp receipts and also the receipts on account of Ameens' fees in the Civil Courts of the different grades in Zillah for the year 1864.

1.	2.	3.	4.	5.	6.
Name of Court.	Value of Stamps received.	Amount refunded under Act X of 1862, Section 26.	Net Amount value of Stamp received.	Receipts on account of Ameens' fees.	Total receipts, being aggregate of Cols. 4 and 5.

B.

Cost to Government of the Civil Courts of the different Grades of Zillah for the year 1864.

1.	2.	3.	4.	5.	6.
Name of Court.	Salary of presiding Officer.	Establishment.	Salary of Civil Court Ameens.	Total Cost of Civil Courts being aggregate of Cols. 2, 3, and 4.	Remarks.

Exemption of Prince Feroze Shah, of the Mysore Family, from personal attendance in the Civil Courts of Lower Bengal.

CIRCULAR No. 3.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to the Civil Authorities in the Lower Provinces, dated Calcutta, 7th March 1865.

(Civil Side.)

Present:

The Hon'ble C. B. Trevor, *Judge.*

THE Court circulate, for general information and guidance, the accompanying copy of a letter, No. 1257 of the 1st instant, from the Secretary to the Government of Bengal, exempting Prince Feroze Shah, of the Mysore Family, from personal attendance in the Civil Courts of Lower Bengal.

No. 1257.

From the Secretary to the Government of Bengal, to the Registrar of the High Court, dated Fort William, 1st March 1865.

SIR,—I AM directed to request that, with the permission of the Honorable Judges of the High Court, you will be so good as to include the name of Prince Feroze Shah, son of Prince Golam Mahomed, of the Mysore Family, in the list of persons who have been exempted from personal attendance in the Civil Courts, under the provisions of Section 22 Act VIII of 1859.

Salaries of Nazirs of Zillah Judges' Courts.

CIRCULAR No. 4.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to all Zillah Judges in the Lower and Extra Regulation Provinces, dated Calcutta, 31st March 1865.

(Civil Side.)

Present:

The Hon'ble C. B. Trevor, *Judge.*

WITH reference to paragraph 9 of Circular Order, No. 10A, dated 26th April last, in which it was intimated that the salaries of Nazirs of Zillah Judges Courts had been fixed at rupees 50 per mensem, the Lieutenant-Governor of Bengal has been pleased,* on the recommendation of the Court, to raise the salaries of the Nazirs of the Judges' Courts in the 11 districts named on the margin † from 50 to 75 rupees each.

* Government letter No. 1584, dated 14th March 1865.

† Backergunge. Bhaugulpore. Dacca. Dinagepore. Hooghly. Midnapore. Mymensingh. Rungpore. Sylhet. Tipperah. 24-Pergunnahs.

2. There will thus be two grades of Nazirs, one drawing rupees 75, and the other rupees 50 per mensem. But it must be distinctly understood that the higher salary is not capable of transfer to any other district than the eleven districts for which it is sanctioned, as it has reference to circumstances peculiar to those districts which are larger and more important than other zillahs, and ential on the Nazirs duties of a more onerous and responsible nature than those devolving on similar officers elsewhere.

Registration Act XVI of 1864, Sections 13, 43, and 45.

CIRCULAR No. 5.

From the Registrar of the High Court of Judicature at Fort William in Bengal to all Civil Judges, dated Calcutta, 31st March 1865.

(Civil Side.)

Present:

The Hon'ble C. B. Trevor, *Judge.*

THE Court are pleased to request the earnest attention of all Civil Judges of whatsoever grade to Sections 43 and 45 Act XVI of 1864, which are quoted for general information.

2. "When any Civil Court shall, *by a decree or order*, declare any *instrument relating to immoveable property which shall have been registered under this Act* to be invalid, or when any Civil Court shall pass a decree or order *affecting the validity or otherwise of any such instrument*, and such last-mentioned decree or order shall create, declare, transfer, limit, or extinguish any right, title, or interest, under such instru-

ment in the immoveable property to which it relates; such Court shall cause a Memorandum of the decree or order to be sent to the Office in which such instrument shall have been originally registered."*

* Section 43.

3. "When any Civil Court shall, by a decree or order, create, declare, transfer, limit, or extinguish any right, title, or interest of any person in *any immoveable property situate in any part of British India in which this Act is for the time being in force*, such Court shall cause a Memorandum of the said decree or order to be sent to every District Registrar, and every Deputy Registrar within the local limits of whose jurisdiction such immoveable property or any part thereof is situate. Every such Memorandum received by a District Registrar or Deputy Registrar shall be entered by him in a book to be kept for the registration of decrees and orders, and a copy of such Memorandum shall be sent to the 'Registrar-General."†

† Section 45.

4. They will not fail to remark that the former Section refers to registered instruments relating to immoveable property, and that the Memorandum is to be sent to the Office in which that instrument was originally registered; whereas Section 45 refers to immoveable property, situated in any part of British India in which the Registration Act is in force, relating to which there is no registered instrument before the Court, and that the Memorandum hereupon is to be sent to every District Registrar and every Deputy Registrar within the local limits of whose jurisdiction such immoveable property or any part thereof is situated.

5. The Court attach the greatest importance to the regular performance of these duties by Civil Judges of every grade, whether sitting as Courts of original jurisdiction, or as Courts of appeal, and the Court expect that District Judges will, from time to time, satisfy themselves that these provisions of the law are in no way neglected by any of their subordinates.

6. The Memorandum should be in one of the forms A or B hereto annexed, and should be transmitted to the proper Registry Office immediately on the signature of the judgment and decretal order by the presiding authority. With the view of ensuring also the performance of these duties by the proper parties after the particulars of the decree have been stated, the words "and a copy of the Memorandum A or B as may be required by Section 43 or 45 of Act XVI of 1865 may be forwarded to such and such Registration Office," shall invariably be entered at the end of decree.

7. Act XVI of 1854 came into operation on the 1st of January of the present year, and it may be that decrees have been passed, requiring from the Civil Courts the adoption of the course of action laid down in Section 43 or 45 of the Act. If this should be the case, Civil Judges will not fail, immediately on the receipt of this Circular, to forward to the Property Registrar the appropriate Memorandum.

8. The Court request that as soon after the 30th June next as possible for the first half-year of 1865, and after that date at the expiry of each successive quarter, a return will be submitted by each Civil Judge, through the District Judge in Form C, hereto appended, showing the operation of these Sections of Act XVI of 1864 for those periods.

9. The Court further think it necessary to call attention to Section 13 Act XVI of 1864, the provisions of which should be strictly enforced—

"No instrument being a deed of gift of immoveable property; no lease of immoveable property for any period exceeding one year; no instrument (other than a deed of gift or lease as aforesaid) which purports or operates to create, declare, transfer, or extinguish any right, title, or interest of the value of one hundred rupees or upwards in any immoveable property; and no instrument which acknowledges the receipt or payment of any consideration on account of the creation, declaration, transfer, or extinction of any right, title, or interest as above of such value as aforesaid in any immoveable property, *shall be received in evidence in any Civil Proceeding* in any Court, or shall be acted on by any Public Officer, if such instrument shall have been executed on or after the date on which the Act shall come into operation, and if the property to which such instrument relates, shall be situate in any part of British India in which this Act is in force, *unless the same shall have been registered* in the manner and within the time prescribed by this Act. Provided that the provisions of this Section shall not apply to any lease executed between landlord and tenant relative to land in the Presidency of Madras liable to the payment of revenue to Government; but any such lease may be registered under Section 16, subject to the provisions of Sections 17 and 19."

FORM A.

Names of Parties to, and number of, the suit, and whether an original or appealed suit.	Serial No. of Registerred Instruments with Page, No. and Vol. of Register in which it has been entered.	Description of the immoveable property referred to in the instrument.	Effect of the decree or order on the instrument.	Date on which decree or order was passed.	Name and official designation of Officer by whom the decree or order was passed.
Ram Doss. *versus* Hurro Chunder Dass. Original suit No. 16 of 1865. (or appeal No. 120 of 1865.)	No. 1 of 1865, 1st January 1865, District Register of Hooghly.	10 beegahs of land, Mouza Shapoor, or Pergunnah Selimabad, Zillah Hooghly, bounded on the north by &c. &c.	Declares it to be invalid.	10th July 1865.	Mr. John Smith, Judge of Hooghly.

FORM B.

Names of parties to and number of, the suit, and whether an original or appealed suit.	Discription of the immoveable property affected by the decree or order.	Effect of the decree or order on the said property.	Date on which decree or order was passed.	Name and official designation of officer by whom the decree or order was passed.
Obhoy Coomar Mitter, *versus* Kali Dass Mitter. Original Suit No. 9 of 1865 (or appeal No. 200 of 1865).	Zemindary A in the Zillah of Hooghly.	Declares the adoption of the plaintiff to have been invalid, and declares the succession of the defendant to the said property as the nearest heir of the late proprietor under the law.	15th May 1865.	Baboo Rampershad Mookerjee, Principal Sudder Ameen.

Quarterly Statement.

FORM C.

Name and designation of Civil Judge.	Number of decrees and orders passed relating to immoveable property.	Number of Memorandum sent in accordance with Sections 43 and 45 Act XVI of 1864, state separately.

N.B.—The returns of each Officer should be separately shown, though embodied in one statement, by the District Judge.

Judges and Magistrates prohibited from forwarding to Goverment representations from their subordinates relating to the personal services of the latter.

CIRCULAR No. 6.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to all Zillah Judges and Magistrates of Districts, dated Calcutta, the 6th April 1865.

(Civil and Criminal Side.)

Present:

The Hon'ble C. B. Trevor, *Judge.*

SEVERAL instances having lately occured in which the instructions of Government, circulated by the late Sudder Court on 30th October, 1840, (No. 3888) have been overlooked, Judges and Magistrates of Districts are remained that Public Officers are prohibited from forwarding to Government representations from their subordinates relating to the personal services of the latter, the Public Post being the most natural and proper means through which persons desirous of bringing their claims prominently to notice may carry their wishes into effect.

CRIMINAL CIRCULAR ORDERS OF THE HIGH COURT.

Relative to Circular No. 18 of 1864—Magistrate Annual and quarterly Returns.

CIRCULAR No. 1.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to the Judicial Commissioner of dated Calcutta, the 10th January 1865.

(Criminal Side.)

Present:

The Hon'ble C. B. Trevor, *Judge.*

As it may be found difficult to apply the instructions of Circular Order No 18, dated 15th September last, to the preparation of the Magistrate's Annual returns of the past year, seeing that the changes introduced by that Circulaar did not have effect until most of the Quarters' returns for 1864 had been submitted the Court are pleased to direct that the headings 14, 15, and 16, of Statement No. 1 Part I, and No. 2, Part I, need not all be filled up. It will be sufficient for the Court's purposes in regard to the Annual returns to have the entire number of persons released in 1864 in a single column, as that will include all cases brought on for hearing in which neither conviction nor commitment has resulted.

2. The new headings should be strictly followed in all the current year's returns Quarterly as well as Annual.

Prisoners sentenced to simple imprisonment cannot be lawfully compelled to labor.

CIRCULAR No. 2.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to all Sessions Judges and Magistrates, dated Calcutta, 13th February 1865.

(Criminal Side.)

Present:

The Hon'ble C. B. Trevor, *Judge.*

As the Court have reason to believe that there exists a somewhat general misapprehension as to the interpretation of simple imprisonment, one of the punishments prescribed in Section 53 of the Penal Code, they think it necessary to remind all Officers administering Criminal Justice, that no prisoners sentenced to simple imprisonment can be lawfully compelled to labor while detained in Jail. There is, however, no objection to such convicts being employed on any trade or occupation permitted in the Jail Rules, *if they of their own free will express their desire for employment.*

The 16th March 1865.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Interest—Payment of, upon Bond.

Kalica Prosaud Misser *versus* Gobind Chunder Sein, Gopaul Chunder Sein, and Okhoy Coomar Dutt.

Under the present law a Court is bound to enforce an agreement between the parties as respects the amount of interest to be paid upon a bond instead of limiting a claim for accumulated interest to a sum not exceeding the principal.

The following cases were submitted to the High Court by the Judge of the Principal Small Cause Court of Jessore, under Section 13, *Act XLII of* 1860.

Cases Nos. 17 and 18 of 1865.

"THE same point, affecting these two cases, has been referred at the desire of both plaintiffs. In No. 17, the plaintiff sued on a bond, dated 18th Joist 1271, for rupees 50, payable in Assar of the same year. The bond contains the stipulation that interest is to be paid at 28 *per cent per mensem* up to the time of payment stated in the bond: and if payment be not made at that time, that interest at the above rate is to be paid on the principal till realized. The plaintiff accordingly sues for Rupees 99-12-0, interest to date of institution, together with the principal Rupees 50, total 149-12-0.

"In No. 18, the original amount of the bond is Rupees 15. A similar stipulation is contained as to interest subsequent to the date on which the bond falls due, and plaintiff sues for Rupees 46-14-0, together with Rupees 15 principal, total Rupees 61-14-0.

"Both cases are brought within the period allowed by the law of limitation, and both, are undefended. In both I decreed as interest a sum equal to the principal. It is contended that I had no discretion in the matter, and that I should have decreed the full amount of the claim for interest in each case. The point, therefore, submitted for the decision of the High Court, is—'When a bond contains a stipulation that, in case the bond be not discharged on the date fixed therein for payment, interest will run at the rate agreed upon after that date until realization, and a plaintiff neglects to sue till the amount of interest exceed the principal; whether or not a Civil Court is authorised to limit his claim for interest to a sum equal to the principal.'

"My authority will be found at page 349 (top) of Macpherson's Civil Procedure (4th edition, 1860). It must, however, be observed that the Circular Orders and Reports quoted by Mr. Macpherson, in his Note are of dates prior to Act XXVIII of 1855, which repealed the Usury Laws in India, and Section 2 of which is as follows:—'In any suit in which interest is reasonable, the *amount* shall be adjudged or decreed at the rate (if any) agreed by the parties; and if no rate shall have been agreed *upon* at such rate as the Court shall deem reasonable.'

"The language of this Section is *imperative* and *permissive;* and as Section I Clause 1 of Act XIV of 1859 contains the same limitation for money lent and for interest, I think it may well be argued that a Court has no right to give a decree which virtually allows a shorter period of limitation than that prescribed by law.

"There are cases in which the Courts have set aside a stipulation as to a very high rate of interest, and have refused to enforce it, regarding it as a mere penal Clause *(see* opinion of the High Court on the point referred from this Court by letter No. 123, dated 25th May 1864). A suit may be brought on an unregistered bond at any time within three years, and this will allow a rate of something over 33 per cent per annum before the interest exceed the principal. It may be argued that any stipulation for higher interest than this is really a stipulation for a penalty.

"I submit that, with reference to the opinion of the High Court quoted above, I was warranted in giving the decree objected to. At the same time I solicit a decision of the High Court on the general point, as to whether a Court can generally, under the present law, limit a *claim* for interest to a sum not exceeding the principal."

Judgment.—We are of opinion that under the present law, the Court is bound to enforce the agreement between the parties as respects the amount of the interest to be paid upon a bond. The law under which a claim for ac-

cumulated interest was limited in amount to a sum not exceeding the principal has been rescinded by Act XXVIII of 1865.

The 16th March 1865.

Present:

The Hon'ble H. V. Bayley and E. Jackson, *Judges.*

Jurisdiction—Suits against Cultivators.

Sreenath Dutt *versus* Dwary Dhallie.

Where a cultivator is a mere servant of the landlord, a suit for damages will lie against him in the Small Cause Court. If the cultivator is a tenant to whom the landlord has sub-let the land, a suit for non-fulfilment of his contract by the tenant will lie under Act X of 1859.

The following case was submitted to the High Court by the Judge of the Principal Small Cause Court of Jessore, under Section 13 *of Act XLII of* 1860.

Case No. 3077 of 1864.

"THE plaintiff, a ryot, sub-lets two beegahs of land to defendant on an agreement that defendant is to give him half the crop raised. The defendant supplies the seed and the labor, and the plaintiff simply gives *the use of the land* to raise the crop. Defendant fails to give plaintiff half the crop as agreed. Can plaintiff sue for the alleged value of the crop in the Small Cause Court?

"It appears to me that a Small Cause Court has no jurisdiction; and that plaintiff's remedy is in the Revenue Court. The contract is one creating *the relation of landlord and tenant* between the parties. In the present case, and in ordinary cases of tenancy of land, the *use of the land as a means of production* is that for which a consideration is agreed to be paid. That consideration is none the less *rent*, whether paid in a fixed sum of money or in a portion of the crop, the quantity of which varies with the quantity of the entire crop. The fact of the remuneration for the use of the natural agent being fixed or variable—being payable in money or in *kind*—does not take the remuneration out of the category of *rent*.

"This mode of sub-letting land is known all over Behar and Bengal. In Behar it is called a *Bhaolee* tenure, in Bengal *Bhagee Adhee*. As a Deputy Collector, I have tried numerous cases of the kind. Nor am I aware that any point has ever been raised as to the jurisdiction of the Revenue Courts under Clause 4 Section 23 of Act X of 1859.

"I refer the point in compliance with the desire of the pleaders in several cases of the kind now before this Court. I had myself no doubt on the subject; but the practice of my predecessor being at variance with my pre-conceived opinion, makes it desirable that the point should be finally settled."

Judgment.—It appears to us that the difference between Mr. Bell and Mr. Field is not on a question of law, but on a question of fact. If the cultivator is a mere servant of the landlord, as Mr. Bell states, Mr. Bell's view is correct, and a suit for damages for non-fulfilment of contract will lie against him in the Small Couse Court. If, however, as Mr. Field finds, the cultivator is a tenant to whom the landlord has sub-let the land, then the provisions of Act X will apply to a suit for non-fulfilment by the tenant of his contract. The fact being found in each case, the law must be applied accordingly.

The 24th March 1865.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Instalment Decree—Alteration of.

Lall Mahomed *versus* Shona Jolla Gazee.

A kistbundee is part of or incidental to the decree of the Court, and cannot be altered after the decree is finally given, unless for the purpose of the correction of errors.

The following case was submitted to the High Court by the Judge of the Principal Small Cause Court of Jessore, under Section 13 *Act XLII of* 1860.

Case No. 2585 of 1854.

The point referred for the decision of the High Court in this case is as follows:—

"A plaintiff obtains a decree for a certain sum payable by instalments. The Judgment-debtor fails to pay one of these instalments, and execution is taken out against him. After his property has been attached, he and the decree-holder come to terms, and an application is made to the Court to withdraw the attachment, and that another kistbundee may be entered on the record. This, of course, will enable the plaintiff to take out execution hereafter if any instalment of the new kistbundee be allowed to lapse unpaid. Should such an application be acted upon or not? Or rather has a Civil Court any authority to enter a new kistbundee on the record thereby actually setting aside the original decree and substituting a new one therefore?"

It seems to me that the parties should settle the matter out of Court; and that, if the decree-holder be willing to give his debtor more time, they should enter into a new arrangement to which the Court should not be made a party, and that the plaintiff should then have "satisfaction" entered on the decree. Sections 51 and 52 of the new Registration Act (XVI of 1864) afford special facilities for thus making an agreement out of Court, affording all the security of the present practice.

There are decrees of this Court payable by instalments which were obtained in 1860-61. Some of the instalments have lapsed unpaid this present year; and applications, similar to the above, have been made for the filing of the new kistbundees, the last instalments of which are payable ten years hence.

Three years hence and within the period allowed by Section 20, Act XIV of 1859, an instalment may lapse unpaid and another ten years' kistbundee may be then filed, and the same process may be repeated *ad infinitum.* I believe this practice prevails in most Civil Courts in the country, and to it is attributable much of the heavy work and consequent delay connected with the execution of decrees. In a Court like this under such a practice, the Execution Department must after some years become almost so heavy as to require a separate establishment. I believe the law allows me ample discretion to deal with the matter; but as I read the law, I believe that the practice is not warranted thereby. The only Section on the subject in Act VIII of 1859 is Section 194, and its very position in Chapter III precludes the supposition that it has any reference to what takes place *after execution.* Nor does the procedure as to execution make any provision for a new agreement as to payment by instalments being entered on the record *after* execution has been taken out. The new Civil Code now before the Council, is similarly silent.

As my own opinion is opposed to the previous practice of this Court, and to the ideas of the vakeels on the subject, I beg to solicit the opinion of the High Court in this case on the following point:—"Is a "*Civil* Court warranted by the present Civil "procedure in making an entry on the record "of a new agreement to pay by instalments "*after* execution has once been taken out on "the original decree?"

If the High Court holds this procedure warranted, may I solicit an expression of their opinion as to the most advisable general course to be pursued in a Small Cause Court.

Opinion of the High Court.—We certify that the kistbundee is part of or incidental to the decree of the Court and cannot be altered after the decree is finally given, unless for the purpose of the correction of errors.

Section 206 of Act VIII of 1859 does not authorize the substitution of a new kistbundee for the old, but only directs that any adjustment between the parties, by way of satisfaction of the original decree, shall be certified to the Court for the purpose of recording to what extent that decree has been satisfied, and not for the purpose of making new term of decree.

Jurisdiction—Suit for cattle or value of cattle.

No. 1203.

Resolution of the High Court of Judicature at Fort William in Bengal, under date the 17th April 1865.

Present:

The Hon'ble C. B. Trevor and G. Loch, *Judges.*

An action for cattle or the value of cattle cannot lie in a Civil Court having jurisdiction within the local limits of a Small Cause Court jurisdiction.

READ a letter No. 35, dated the 9th ultimo, from the Judge of the Court of Small Causes at Meherpore, requesting the Court's opinion as to whether he can order the attachment of certain cows in execution of a decree of his Court in the face of a decree obtained by certain claimants in the Court of the Moonsiff of Meherpore for the same property.

Under the circumstances stated by the Judge, the Court are of opinion that his view of the question is correct, and that no action for the cattle or the value of the same can lie in a Civil Court having jurisdiction within the local limits of the Small Cause Court jurisdiction (Section 6 Act XLII of 1860), that consequently the Moonsiff's judgment is a nullity; and that the Judge should proceed to execute his decree regardless of it.

* No. Section 12 Act XI of 1863.

Execution of decree (against immoveable after moveable property).

No. 1365.

From the Registrar of the High Court, &c., dated Calcutta, the 28th April 1865.

(Civil Side.)

Present:

The Hon'ble C. B. Trevor, G. Loch, and W. Morgan, *Judges.*

Procedure under the new Small Court Act against immoveable property if the sale of moveable property has not satisfied the decree.

SIR,—I am directed to acknowledge the receipt of your letter No. 125 of the 12th instant, and in reply to state that the question therein submitted is very indefinitely put The Court do not think Section 286 of Act VIII of 1859 is applicable to it. They observe that the law of the Small Cause Courts now is Act XI of 1865, passed on 15th March last. By Section 19 of that Act process may first issue out either against the person or personal property, either general or specified, within the local limits of the Court jurisdiction, and if, after the sale of the moveable property of a judgment-debtor, a portion of the judgment remains unsatisfied, and the holder of the judgment desire to issue execution on any immoveable property, then the Court, on application of the decree-holder, can, under Section 20, grant him a copy of the judgment and a certificate of the sum remaining due, or on presentation of the same to any Court of Civil Jurisdiction having *general Jurisdiction* in the place in which the immoveable property of the judgment-debtor is situated, and such Court shall proceed to enforce such judgment according to its own rules and mode of procedure in like cases. It is clear that the words *general Jurisdiction* refer to the ordinary Civil Courts, and to them, therefore, the applications should be made. Moveable property beyond the local limits of a small Cause Court seems not to be liable to be taken in execution.

The 26th April 1865.

Present:

The Hon'ble H. V. Bayley and J. B. Phear, *Judges.*

Jurisdiction—Suit for rent upon kistbundee—Suit for money paid for, but no applied in, satisfaction of decree under Act X of 1859.

Rajah Shutt Churn Ghosal,

versus

Mahomed Ally.

Tarinee Churn Roy,

versus

Gopal Kishto Roy.

A suit upon an instalment bond given for arrears of rent is cognizable in the Small Cause Court.

Also a suit by a judgment-debtor to recover money paid by him to be applied in satisfaction of a decree under Act X of 1859, but not so applied by the decree-holder.

The following cases were submitted to the High Court by the Judge of the Small Cause Court of Backergunge, under Section 13 *Act XLII of* 1860.

Case Nos. 171 and 128 of 1865.

I MOST respectfully solicit that you will do me the favor to obtain for me the opinion of the High Court on the following points in the cases noted in the margin.

Case No. 171 of 1865 money claim on Instalment Bond laid at rupees 290-1.
Rajah Shutt Chunder Ghosal, plaintiff,
vs.
Mahomed Ally, defendant.
Case No. 128 of 1865, money claim laid at rupees 15. Tarinee Churn Roy *vs.* Gopal Kishto Roy.

Section 3 of Act XLII of 1860 lays down that *no case for the rent of land* or any other claim for which a suit may be brought before a Revenue Officer shall lie in a Court of Small Causes. The plaintiff of the 1*st* case has brought a suit on a *kistbundee*, dated 28th Chyte 1269 B.S. given *for arrears* of *rent* extending up to that date. Is this case cognizable by this Small Cause Court? A precedent of the High Court, dated 8th January 1864, Kishen Koomar Mitter and others appellants, defendants, *versus* Mohesh Chunder Banerjee, plaintiff, respondent, published in the Revenue, Judicial, and Police Journal at page 16, would lead to the inference that suits relative to arrears of rent are not cognizable by the Civil Courts. Can this precedent apply when an instalment bond has been given for *back rents?*

In the next case plaintiff was judgment-debtor in a case decreed in favor of defendant, decree-holder, *under Act* X *of* 1859, and sues for return of money paid in liquidation of the decree which has not been carried to his credit. As Section 206 of Act VIII of 1859 lays down that no adjustment of a decree, in part or in whole, shall be recognized by the Court, unless such adjustment be made *through the Court* or be certified to the *Court* by the person in whose favor the decree has been made, or to whom it has been transferred—and again Section 11 of Act XXIII of 1861 further declares that all questions relating to payments said to have been made in discharge or satisfaction of a decree or the like shall be determined by order of *the Court executing the decree* as previously laid down by Construction 1129, and *not by separate suit*—can the present suit be considered cognizable merely because the decree previously passed in favor of defendant against plaintiff was one *under Act X* and not *Act VIII* of 1859? In my opinion, plaintiff ought to have urged this payment before the Revenue Court in the execution of the decree passed against him; as he did not do so, this Court cannot take cognizance of his claim.

Opinion of the High Court.—On reading the statement of a case submitted to us by the Judge of the Small Cause Court of Backergunge in reference to the above two suits respectively (no advocate having appeared before us on either side), we certify our opinion as follows:—

With regard to the *first* question put to us, the obligation on the *kistbundee* or instalment bond constitutes a mere debt, which may be sued for in the Small Cause Court. Forbearance to use the landlord's remedies for arrears of rent, formed the consideration for the new contract; and the contract which has thus arisen is in the same situation as any other Civil Contract, and must be enforced by the same procedure.

And with regard to the *second* question, we think that, looking to the preamble of Act XXIII of 1861 as well as to the words of Section 11 itself, the provisions of that Section are only applicable in suits where the procedure is that prescribed by Act VIII of 1859 and the Acts subsequently passed for amending it. But it has been held by this Court in Doyal Chunder Ghose and others *vs.* Dwarkanath Misser and others, Marshall 148, 16th September 1862, that the procedure of Act VIII of 1859 is not applicable to suits under Act X of 1859, except so far as it is especially made so by legislative enactment, and no such enactment exists in reference either to Section 206 of Act VIII of 1859, or to Section 11 of Act XXIII of 1861.

We are, therefore, of opinion that there is nothing to prevent the plaintiff from bringing a suit in the Small Cause Court to recover from the defendant money which he has received to the plaintiff's use, *viz.*, the money which he received to be applied in reduction of the decree-debt, and has not so applied.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

The 2nd August 1861.

Present :

Lord Kingsdown, Sir E. Ryan, the Master of the Rolls, and Sir L. Peel.

Purchase of putnee (Suit to claim the benefit of a—as benamee)

On Appeal from the Sudder Dewanny Adawlut at Calcutta.

Kripamoyee Debia,

versus

Romanath Chowdhry.

Examination of the evidence in a suit brought to recover a putnee-talook as having been purchased benamee for the appellant's late husband.

The simple possession of the title-deeds by the plaintiff (appellant), without satisfactory proof of the mode by which she alleged that she acquired possession of them, was held not to outweigh the other circumstances of the case which strongly preponderated in favor of the respondent.

The sale having taken place in 1836, and no suit having been instituted until 9 years afterwards, this delay was considered a very material circumstance against the appellant; more especially as the death of the person on whose account alone the matter was alleged to have been kept secret, had occurred in 1836.

Another important circumstance connected with this lapse of time was that the suit was not instituted until after the deaths of two persons who could have spoken positively to the truth of the case, and whose evidence was of the greatest value in the determination of it.

In affirming the decision of the Court below, the Judical Committee adverted to the consideration that the appeal was from a unanimous decision on a question of fact in which the Lower Court had the opportunity of seeing and testing the mode of giving evidence of such witnesses as appeared before them.

THE question in this appeal is whether the purchase of a putnee-talook made by Juggurnath Roy, on 6th September 1835, was a benamee transaction, that is, whether it was bought with the money of, and in trust for Hurro Kanth Roy, who is now deceased, but whose widow is the appellant. Substantially, the question depends upon whether an ekrar-nuttro, or declaration of trust, purporting to bear date the 29th Kartick in the year 1242, which corresponds to 14th November 1835, and which also purports to have been executed by Juggurnath Roy, is a real or supposititious document.

We entertain no doubt, if on the evidence it should appear that no reliance is to be placed on this document, that there is no other evidence before us sufficient to establish that the transaction in question was a benamee transaction.

In consequence of the non-payment of the rent, the amount of which was disputed, the putnee-talook was, after various proceedings to which it is unnecessary to advert, sold by the Revenue Authorities, on 21st May 1836, by public auction to Kalee Kanth Lahoree, who was the highest bidder and who has since died, but whose heir is the first respondent on the record.

The suit to recover the putnee talook was first instituted by Hurro Kanth Roy on 1st March 1845; that suit failed in April 1850 by reason of misdating the ekrar in the plaint, which error the Court refused to allow to be corrected.

On 18th July 1850, the appellant filed her plaint in this suit.

On 26th December 1854, the Principal Sudder Ameen dismissed the appellant's suit with costs.

This decision was appealed from to the Court of Sudder Dewanny Adawlut at Calcutta, and, on 28th December 1857, the decree of the Court below was affirmed with costs, which is the decree appealed from to us.

The original kubalah granting the putnee-talook was made on the 22nd Bhadhoon 1242, which corresponds to 6th September 1835; it was attested by fourteen witnesses, and, at the same time, a kubooleut, or counterpart, was executed by Juggurnath Roy, containing the usual condition that, if the rent were not paid, the zemindar should be at liberty to sell the talook under the provisions of Regulation VIII of 1819. This counterpart was executed by nine witnesses, of whom the first and last were also attesting witnesses to the kubalah; but the remaining seven witnesses were distinct and different persons.

That the same witnesses, fourteen in number, who attested the kubalah, should be obtained to attest the ekrar, two months later, is a circumstance which, in our mind, gives rise to very grave suspicions. No valid reason is given for this peculiarity; the collection of exactly the same fourteen persons who had attested an instrument two months before, for the purpose of attesting

another instrument, must have occasioned both difficulty and delay; and it is not pretended that the circumstance of the witnesses who attested both instruments being the same, could confer additional validity on the ekrar. So little did this seem to be a matter of importance to the parties engaged in the transaction on 6th September 1835, that, of the two instruments then simultaneously executed, only two witnesses attested both. The suspicion created by this circumstance is augmented by the consideration that, in the original plaint, which was filed on 1st March 1845, the ekrar is alleged to bear the same date as that of the kubalah. If, in truth, the ekrar had been executed at the same time with the kubalah, it might well be that the same witnesses who attested the lease would also attest the declaration of trust: and, indeed, such a supposition would be natural and probable. Upon the assumption that the original plaintiff had intended to set up a fictitious ekrar with a view of establishing the transaction to be one of a benamee character, it would be natural to set up an ekrar of even date with the original kubalah, in which case it would be naturally attested by the same witnesses, and accordingly such was the plaintiff's allegation contained in the original plaint; and we cannot but consider it a matter also open to suspicion, in so important a matter as the statement in the plaint of the ekrar on which the whole of the plaintiff's case depended, an erroneous date should have been assigned to that instrument. It is to be observed also, that the ekrar itself, on the face of it, seems to have been framed as if it had been intended to be contemporaneous with the kubalah, for it speaks of the delivering up of the umulnamah, or letter of authority, *of to-day*, that is, of the day of the date of the ekrar; but the only umulnamah of the existence of which any evidence is given, is the umulnamah of the date of the original kubalah.

On the assumption that it was intended to set up a fictitious deed, various circumstances might, after the institution of the original suit, render it impossible to act on that intention, and to establish by proof an ekrar of even date with the original kubalah.

The following are instances:—The witnesses speak of Hurro Kanth Roy as having been present at the time when the ekrar was executed, and even of the conversation which passed between him and Juggurnath Roy on that occasion Hurro Kanth Roy was, at the date of the execution of the kubalah, distant four or five days' journey off, at Calcutta. This fact might possibly have been established by evidence brought on the part of the defendants. There were present at the time when the kubalah was executed, in September 1835, the witnesses to the kubooleut; and these witnesses, or some of them, might have been called, and not only disproved the presence of Hurro Kanth Roy, but might also have disproved the execution of any ekrar at all at that time, and might have given evidence which would have been irreconcileable with the evidence on the part of the plaintiff.

Assuming, therefore, that a fictitious deed was intended to be set up, this circumstance might explain how it was originally intended to set up an ekrar of even date with the original kubalah, and how that intention was afterwards abandoned as far as regarded the date of the instrument.

Another circumstance which creates grave suspicion in our minds is the age of Hurro Kanth Roy at the time of the transaction. This we consider to be proved by the deposition of Hurro Kanth Roy himself, made in a distinct matter on 12th May 1843. By this deposition it appears that he was then at the Government school at Rampore, and that he stated his age to be at that time 17 or 18. This was eight years and nine months after the date of the ekrar. This would reduce his age at the time of the transaction to 9 or 10 years old. The explanation attempted to be given, that he understated his age for the purpose of entering the school, by the regulations of which no pupil could be admitted who had passed a given age, even if admitted, could only extend to a year or two; but no latitude which could be given to this suggestion, would induce us to believe that a man of 26 or 27 could pass off for a youth of 17 or 18; but we have no reason to doubt the accuracy of the statement of his age contained in the deposition which was made by himself in a matter in which his age was not a matter of importance, and by which it appears he was then under the master of the school, and in which he speaks of the other lads of the school.

We are, therefore, of opinion that, on the evidence before us, the age of Hurro Kanth Roy in November 1835 must be considered as not exceeding 10 or 11 years. In what way a boy of 9 or 11 years of age could be possessed of money sufficient for the purchase of the putnee-talook, the evidence fails to explain.

But this is not the only difficulty presented in the way of the appellant by the youth of her husband at the time of this transaction. The evidence given by the witnesses of the conduct of Hurro Kanth Roy on this occasion is irreconcileable with the supposition that he was not more than 11 years old, even allowing much to the precocity ascribed to Indian youths.

Ram Nedhee Deb (page 106) said that this boy of 10 or 11 years old gave directions for obtaining some of the Rajah's mehal, if any were to be let out in putnee. The witnesses all speak of his understanding the transaction, and taking a part in it.

Gooroo Dyal Roy (page 76) says that Hurro Kanth Roy sent the money for the kubalah, 4,700 rupees in specie, from Calcutta, by him and three other persons, accompanied by five or six others, by a boat; a very improbable mode of transmitting money in a country where Government notes were in circulation.

Kalee Pershad Doss (page 79) says that Juggurnath Roy and Hurro Kanth Roy corresponded on this subject, and that Hurro Kanth Roy wrote letters to Juggurnath Roy on the subject, and they all state that he went from Calcutta to Sydabad, for the purpose of completing the transaction.

A careful examination of the witnesses also discloses various inconsistencies in their testimoney. Two of them *viz* Hurro Dass (page 72) and Gour Mohun Dass (page 75) in their depositions made in the first suit, speak of the ekrar as orginating from Juggurnath Roy; but the two witnesses examined in the suit, Ram Nedhee Deb (page 105) and Sheetal Ram Raha (page 108) say that the ekrar was made at the instance of Hurro Kanth Roy.

This latter observation would not have much weight were it standing alone; but combined as it is with the other circumstances enumerated above, it adds to the suspicion necessarily created by the other facts in the case. It is not to be overlooked also that the ekrar was not registered; to this omission, however, little weight would have to be attached, if the whole of the rest of the case were free from suspicion, by reason of the desire to keep the matter secret, which, on the assumption that it was a benamee transaction, and intended to be concealed from Rajah Gobind Chunder, was intelligible enough.

The circumstances above enumerated, if they stood alone, would bring our minds to the conviction that no reliance could be placed on this ekrar in a Court of Justice as an authentic document.

But there is some evidence on the other hand, in favor of the transaction having been originally a benamee transaction. The strongest portion of this is to be found in a letter which, singularly enough, has been produced on behalf of the defendant Kalee Kanth Lahoree; it is, therefore, free from all suspicion when used on behalf of the plaintiff: this is a letter (page 117) written in October 1835, between the date of the kubalah and the ekrar addressed to Juggurnath Roy, apparently by the Maharanee Kishenmonee Takooranee, who was aunt of Hurro Kanth Roy. It seems to have been written in answer to a letter from Juggurnath Roy, requesting from her directions respecting this putnee, and in it she directs that a mooktearnamah should be made out in the name of Nub Kunt Roy, and coupled with that of Oomapersaud Lahary, to whom the documents relating to the putnee and the kubalah were to be forwarded. This direction to some extent, at least, seems to have been acted upon by Juggurnath Roy, and it is certainly very difficult to reconcile the writing by Juggurnath Roy of the letter to which this was an answer, with the supposition that he was the beneficial owner and purchaser of the putnee-talook. This observation, however, although in favor of holding that the transaction was originally one of a benamee character, does not establish the case of Hurro Kanth Roy, or make out any title in him to the putnee-talook. It may be that the Maharanee was the purchaser of the putnee-talook; but that is not the case of the plaintiff, or what we have to consider in this appeal. This document has, however, although indirectly, a bearing on the part of this case which is that which is indeed the principal foundation of the plaintiff's case, *viz.*, the presence of all the deeds and papers relating to this putnee-talook, and the wasilat papers during the time which elapsed after the kubalah, and before the sale in May 1836, which are all now in the hands of the plaintiff. This letter of the Maharanee authorizes the delivery of all papers relating to the kubalah to Nub Kunt Roy. Hurro Kanth is stated in the judgment of the Court (page 154) to have resided with Nub Kunt Roy, who pre-deceased him; and it is suggested that by this means the original documents may have come into the possession of Hurro Kanth Roy. Whether this be so or not, it will not, in our opinion, affect the ultimate decision of the case.

The mode by which the plaintiff alleges that she acquired possession of these documents not established to our satisfaction; and this being so, we cannot allow the simple possession of them to outweigh the other circumstances of the case, which, in our opinion, strongly preponderate in favor of the respondent.

One circumstance, however, and that a very material one, remains to be noticed, and which makes strongly against the claim of the appellant; and this circumstance is, that the sale having taken place in May 1836, no suit is instituted until March 1845, a period of nine years. This circumstance is the more noticeable, because it appears that the Rajah Gobind Chunder, on whose account alone the matter is alleged to have been kept secret, had died in November 1836, thereby releasing Hurro Kanth Roy from the fear of his making any claim to the putnee-talook, the apprehension of which is alleged to have been the the cause of the benamee.

Another circumstance, connected with the lapse of time, is also most important, for the suit was not instituted until after the deaths of both Juggurnath Roy and Nub Kunt Roy had taken place, and they were the persons who could have spoken positively to the truth of this case, and whose evidence was of the greatest value in the determination of it.

Taking all these matters into consideration, and also bearing in mind that this is an appeal from the unanimous decision of the Court below on a question of fact in which they had the opportunity of seeing and testing the mode of giving evidence of such witnesses as appeared before them, we are of opinion that the decision of the Court below ought to be affirmed; and their Lordships will humbly recommend Her Majesty to dismiss the appeal with costs.

The 2nd August 1861.

Present:

Lord Kingsdown, Lord Justice Knight Bruce, Sir E. Ryan, Lord Justice Turner, and Sir L. Peel.

Joint Hindoo Family (Illegitimate children of Christian father by different Hindoo women)—Succession—Inheritance—Collaterals—Partition—Appeal (from part of a decree)—Reference to Law Officer (on questions of right and title).

On Appeal from the Sudder Dewanny Adawlut at Madras.

Myna Boyee and others,

versus

Oottoram and others.

Illegitimate sons of a Christian father by different Hindoo women, although by agreement they constituted themselves parceners in the enjoyment of their property after the manner of a joint Hindoo family, are not a joint Hindoo family according to Hindoo Law. On the death of each, his lineal heirs representing their parent would, by the effect of the agreement, enter into that partnership.

Quære—Whether the Hindoo Law give a right of inheritance to collaterals.

In a partition suit instituted by one of the illegitimate children, a deed of compromise was executed by the parties which provided for the mode of enjoyment, and against the sale, mortgage, lease, or security of any separate share. HELD (1) that these provisions of the deed did not extend to prevent alienation by devise, nor affect the right of inheritance; and (2) that the arrangement between the parties included the right of survivorship, the claim of the State only arising on failure of heirs of the last survivor.

In an appeal from part of a decree, the whole decree is not open to the respondents. Under the peculiar circumstances of this case, however, leave was given to present a cross appeal, and the appellants not objecting, the appeal was heard from the whole decree.

Every reference in a suit to Law Officers, likely to bind a right, should embrace all important facts proved or admitted in the cause which may affect the conclusion; and it is the duty of the Court itself so to frame the question as to elicit an opinion upon the very facts on which the legal title depends. If the facts be not ascertained but are stated and disputed, the questions should embrace either view of the facts. When the opinion given is apparently irreconcileable with the opinions of approved text-writers, those who give the opinion should be asked further to explain that which appears *primâ facie* thus irreconcileable, so that they may show on what they ground an apparent exception from the general law, whether on general custom modifying texts, on local usage, family customs, or other exceptional matter.

THE facts of this case, so far as they are material to the questions we have to consider, lie in a narrow compass. Mr. George Arthur Hughes, an Englishman, living in India, had two illegitimate children, named Ramaprasad and Taukooram, by a native woman, a Hindoo, who appears to have been a married woman, to have deserted her husband, and to have lived in adultery with Mr. Hughes. This woman appears to have been originally of one of the privileged classes, and not of the Sudra class. Mr. Hughes had also three other illegitimate children, Myaram, Chundoolaul and Oottoram by another native woman. By his Will he devised the estate of Kadalkoody to his five illegitimate children in equal shares, to each a fifth share. The children appear to have been brought up as Hindoos, and to have lived at first as an united family, but

some time after Mr. Hughes' death, Ramaprasad, the original plaintiff in the suit from which this appeal arises, instituted a suit for partition, and obtained a decree accordingly. There was an appeal from this decree; and pending this appeal the parties compromised, and a razeenamah, or deed of compromise, was entered into between them. This deed, to which four of the children, one of whom, Chundoolaul, had purchased the share of Oottoram, the fifth of the children, who had died, after reciting the Will of Mr. Hughes and the above-mentioned purchase, proceeded as follows:—

"Of the said Kadalkoody paliaput, the share assigned to the third appellant by Mr. Hughes' Will is one-fifth, and this added to the one-fifth share purchased by him as stated above, makes his total share two-fifths of the whole estate. The share assigned to the second appellant Myaram under the said Will is one-fifth, and that left to the first appellant Taukooram and the respondent Ramaprasad by the said instrument is one-fifth each. Thus it having been settled that we four should enjoy the said zemindary in five shares, we have entered into the following agreement, *viz.*: That from Fusly 1254, the management of the entire zemindary shall, for life, be entrusted to one of us four, *viz.*, Taukooram, the other three abiding by this arrangement. That the paishcush, amounting to rupees 4,469-8-0 per annum, shall be punctually paid by Taukooram from and out of the income of the paliaput for each Fusly, the irsal or remittance being made in the names of us all four. That all the repairs necessary to the paliaput shall be executed by him every year, at an annual outlay of 500 rupees, he taking care that the money is properly spent. That of the surplus left of each year's income, after defraying the paishcush, charges of repairs, and costs of establishment of that year, Taukooram shall pay to Myaram and Chundoolaul whatever may fall due to them for their said three shares as per accounts. That, on account of the one-fifth share of Ramaprasad, Taukooram shall, for his life, pay into the Treasury of the Court, the fixed sum of 1,300 rupees a year, a moiety thereof being payable on 11th April, and the other moiety on the 11th July of each Fusly. That Ramaprasad, or the heirs appointed by him, shall receive the said sum from the Court. That, should the income of Ramaprasad's said one-fifth share for any year exceed the fixed amount above referred to, such excess shall be appropriated by Taukooram. That should the income of the said share fall short in any year of the fixed sum above referred to, Taukooram himself shall make good such deficit. That Taukooram shall be entrusted with the title-deeds of the said paliaput, and any sharer shall be at liberty to refer to them whenever he wishes. That should the accounts furnished by the Ameen deputed to attach the paliaput exhibit any old balance outstanding for Fuslies 1251 to 1253, during which period the paliaput remain under attachment, Taukooram shall recover the same and pay to Ramaprasad his one-fifth share thereof, taking a receipt from him. That, the other sharers also shall receive their shares of the said balance in the same manner. That after Taukooram's death Ramaprasad, or the heirs appointed by him, shall have the management only of his one-fifth share, subject to profits or loss. That the management of the other four shares shall be entrusted to Myaram or Chundoolaul, or their heirs or representatives, appointed by them. That the ryots, kurnums, servants, &c., of the paliaput, shall pay to the other sharers, when they go to visit the estate, the very same respect that they would show to Taukooram or persons entrusted with the management after his lifetime. That the paliaput shall never be divided, but only the income thereof, of which each sharer shall receive and enjoy his share with reference to accounts of income and expenditure. That neither the sharers, nor their heirs or representatives appointed by them, shall alienate their respective shares by sale, mortgage, lease, or security; all such transactions, if effected, being null and void."

In pursuance of the arrangement made by this deed, Taukooram had the management of the estate during his life, and paid to Ramaprasad, the annual sum stipulated for by the deed. On 21st January 1852, Taukooram died intestate and without having had issue; and, on his death, Chundoolaul took possession of all his real and personal estate, including his one-fifth part of the Kadalkoody estate. The plaint in the suit which has given rise to the appeal before us, was filed on 8th September 1852, by Ramaprasad claiming as the heir of Taukooram against Chundoolaul for the recovery of the real and personal estate of Taukooram. The defendant, Chundoolaul, by his answer in the suit amongst other grounds of defence, which are not material to be mentioned, stated that, in the partition suit, the plaintiff had declared that he was not related to Taukooram; that if they were co-parceners, they were so through their father and not through their mother; and that the Hindoo Law was not applicable to them. That each of them having received a certain amount of property under Mr. Hughes' Will, their interests were distinct, and one of them had nothing to do with another's portion; that that was the status in which Ramaprasad had in the partition suit, prayed the Court to place him; and that the decree in that cause was that the parties were not amenable to the Hindoo Law, and he insisted that in the teeth of these proceedings in the former suit, it was not open to the plaintiff to claim Taukoo-

ram's share of the estate of Ramaprasad; he relied also upon the razeenamah, insisting that Taukooram's intention that his share of the Kadalkoody estate should on his death pass to him, the defendant, was evident from the fact of that instrument containing a detailed provision that Taukooram's share, and the management of the other four shares of the estate, should be held in succession by the defendant and his heirs, or other persons appointed by him; he also set up a mooktearnamah and a Will alleged to have been made by Taukooram in his favor.

The plaintiff, by his replication, explained the allegations made by him in the partition suit, and denied that they bore any such meaning as was imputed to them by the answer.

The rejoinder was a mere recapitulation of the answer; and the only material evidence in the cause was, on the part of the plaintiff, the razeenamah, and on the part of the defendant, the mooktearnamah, and the Will, with the depositions of some witnesses in support of those instruments. There was no evidence as to the plaintiff's title as heir; but upon this point the following question appears to have been submitted to the Pundit of the Court of Sudder Adawlut:—

"You are requested to state whether, upon the death of one of two illegitimate sons of a Hindoo woman, the estate of the deceased by law devolves upon the surviving brother?"

And to this question the following answer appears to have been returned:—

"If the illegitimate sons referred to in the question were undivided, the estate of one of them would, after his death, devolve upon his surviving brother. If divided, it would go to him only on failure of the deceased's widow, daughter, or her son, or of the deceased's mother."

Upon the hearing of the cause in the Zillah Court, the Judge was of opinion that the mooktearnamah and the Will were forgeries, and that the provisions of the razeenamah had reference to the management of the estate, and did not affect the right to it; and resting upon the opinion of the Law Officers, he treated the allegations in the partition-suit as irrelevant, and considered the plaintiff's title as heir to be established. The decree of the Zillah Court, therefore, was wholly in favor of the plaintiff.

From this decree the heirs of Chuttoolaul, who had died in the meantime, appealed to the Court of Sudder Adawlut; but the Judges of that Court were also of opinion that the mooktearnamah and the Will were not genuine documents; and as regards the right of the plaintiff to inherit the property of his uterine brother Taukooram, they were of opinion that those persons must be looked upon as Hindoos, and subject to Hindoo Law; and the question as to the Hindoo Law of the case having, as they thought, been fairly put to the Pundits of the Court, they considered that the plaintiff had a right to inherit the property of Taukooram. They accordingly, by a decree dated 7th November 1856, affirmed the decree so far as respects the estate of Taukooram not included in the razeenamah; but as to the one-fifth part of the Kadalkoody estate, which was included in the razeenamah, they were of opinion that the intent of that instrument was, that the right of the plaintiff should be confined to the enjoyment of his own one-fifth share and the management thereof, and that the right and title to the management and enjoyment of the profits of the other four shares was vested in the other shareholders; and they accordingly held that the plaintiff was not entitled to recover the one-fifth share of the Kadalkoody estate, which belonged to Taukooram, and reversed that part of the decree which awarded that share to the plaintiff.

The plaintiff, however, afterwards obtained, as it would appear, *ex-parte*, an order for the case to be re-heard, but he died soon after the making of this order, without having had issue.

By his Will, which appears on these proceedings to have been disputed, he devised the Kadalkoody estate to the now appellants, and appointed two of them to be his executors. They accordingly revived the suit; and the Sudder Court having subsequently, by an order dated 12th November 1857, discharged the order for re-hearing, upon the ground that the case was more proper to be the subject of appeal, they obtained leave to bring, and have accordingly brought, this appeal, which is from so much of the decree of the 7th November 1856 as reversed the decree of the Lower Court so far as it awarded to the plaintiff Taukooram's share of the Kadalkoody estate, and also against the order of the 12th November 1857.

With respect to the objection raised by the answer that the appellant was precluded by reason of the allegations made by him in the partition-suit, their Lordships are of opinion that no weight is due to that objection. The allegations referred to could, at the highest, operate only, under the circumstances of this case, as an admission against title, on a particular view of the legal status of the party, in point of law, which, if it were erroneous, ought not to have bound the party in another suit for a different object, the Court having before it all the facts relating to the true status.

The immediate question raised by this appeal, therefore, is whether the Sudder Court was right in the construction which is put upon the razeenamah. Their Lordships find themselves unable to agree with the Sudder Court upon the construction of this deed. The deed had its origin in the partition suit. The result of that suit and of the decree which had been made in it, if carried out would have been to sever, at all events, one-fifth of the estate, and to destroy, to that extent at least, not only all unity of interest but all power of joint management.

The deed appears to have been framed for the purpose of avoiding these results. It provides that there shall be no sale, mortgage, lease, or security of any separate share; that during the life of Taukooram he shall have the management of the whole estate, Ramaprasad receiving a fixed income; and that, after his death, Ramaprasad shall have the management of his fifth, and the management of the other four-fifths shall be entrusted to Myaram or Chundoolaul; but these provisions point to management, and to management only. They affect the mode of enjoyment, not the right of property. That right does not appear to be affected by the deed, otherwise than by the particular provisions against alienation—provisions which, it is to be observed, are carefully limited by the deed, and do not extend to prevent alienation by devise, for it is plain that the deed contemplates that each co-sharer might devise. It is scarcely possible to suppose that it could be intended that the right to devise should be preserved, but that the right of inheritance should be taken away. Failing this argument upon the construction of the razeenamah, the respondents contended that the title of the appellant was nevertheless defeated by that instrument. They argued that all the illegitimate sons were to be considered, as they were considered, and, as it appears to their Lordships, rightly considered, in the Courts in India, to be Hindoos; and that the sons, except Ramaprasad, having continued in common, Ramaprasad could not, by the Hindoo Law, be entitled to any portion of Taukooram's share.

This argument renders it necessary to consider what sort of a partnership was constituted by the actual agreed union of the other sons. They were not an united Hindoo family in the ordinary sense in which that term is used in the text-writers on the Hindoo Law; a family of which the father was, in his life time, the head, and the sons in a sense, parceners in birth, by an inchoate though alterable title; but they were sons of a Christian father by different Hindoo mothers, constituting themselves parceners in the enjoyment of their property after the manner of a Hindoo joint-family. On the death of each, his lineal heirs, representing their parent, would, by the effect of the agreement, enter into that partnership; collaterals, however, could not so enter by succession, unless the Hindoo Law gave, in the case under consideration, a right of inheritance also to collaterals. The parties could not, by their agreement, give new rights of succession to themselves or their heirs unknown to the law. The law of survivorship, which is the consequence of such a partnership amongst Hindoos, would come in only on failure of the heirs.

A further suggestion was made on this part of the case, that, from the peculiar status of the parties, it was to be presumed that the intention of the instrument was to bar the State by the arrangement between the parties, *inter se*, as to the enjoyment of the property; but no such intention is to be collected from the instrument, or is disclosed by the evidence; and it may be added that the arrangement for the parties continuing in common would, as already observed, include survivorship, and that it could, therefore, only be on failure of heirs of the last survivor that the claim of the State could arise. The instrument too, in its dealings with the management, contemplates the existence of *hœredes facti* and the parties, therefore, cannot but have been aware that they had in their power the means, of protection against any claim of the State. So far, therefore, as the immediate question raised by this appeal is concerned, their Lordships are of opinion that the decree complained of cannot be maintained.

A further question was also raised on the part of the respondents, whether the appeal, although from part of the decree only, did not open to them, the respondents, the whole decree. Their Lordships were of opinion that it did not, but they thought that under the circumstances of this case, leave should be given to present a cross-appeal, and the appellants not having insisted that the mere form of presenting such an appeal should be gone through, it was agreed that the whole decree should be considered as open.

The whole case as to the mooktearnamah and the Will, and as to the appellant's title as heir to Taukooram, was thus open to the respondents. Nothing was said by them as to the mooktearnamah or the Will, and it is unnecessary, therefore, to refer further to those documents, which no doubt were forged. The contention was as to Ramaprasad's title as heir. This title appears to have been affirmed by both the Courts in India, upon the faith of the opinion given by the Law Officers. It does not appear to have been further investigated or enquired into.

The correctness of this opinion was questioned by the respondents, who objected to the mode in which the question was submitted to them; but the Court declined to take another opinion, and adopted the opinion of these officers, apparently without noticing its inconsistency with the ordinary text expositions of the Hindo Law. The question submitted to the Law Officers does not include some important facts which existed in this case. Every such reference in a suit, where it may bind a right, should embrace all important facts proved or admitted in the cause, which may affect the conclusion; and it is the duty of the Court itself so to frame the questions that they may elicit an opinion upon the very facts on which the legal title depends. If the facts be not ascertained, but stated, and disputed, then the questions should embrace either view of the facts. When the opinion given is apparently irreconcileable with the opinions of approved text-writers, those who gave the opinion should be asked further to explain that which appears, *primâ facie*, thus irreconcileable, so that they may show on what they ground an apparent exception from the general law, whether on general custom modifying texts, on local usage, family customs, or other exceptional matter.

In this case it was very important to point out to the notice of the Law Officers that the mother of the plaintiff and of his uterine brother was a wife living in adultery—originally, as above-mentioned, one of the privileged classes; that her sons were adulterous issue; that the property had never been the mother's but had been bequeathed by the father, an Englishman, to his sons, as his sons, and was meant by him to be a parental provision for his children. It was not referred to the Law Officers to consider whether the inability of the sons to succeed to the father affected their heritable capacity as collaterals *inter se*.

On the terms of the answer, the Law Officers may have considered the case merely as one of succession amongst Sudras proper, and may have acted simply on a wider view of the law of succession amongst Sudras than the written text authorities afford. They may have viewed it as enlarged by some general custom there prevalent extending the law, according to the principles of the Hindoo law which would support such custom, if, in fact, such custom has obtained.

It is, however, impossible to treat these sons as the sons of a Sudra father; if the appellant and Taukooram be viewed as the sons of a Sudra mother, still the property never was hers, and their heritable capacity even to property of hers has not been established. If any general usage in this part of India has ripened into a custom having the force of law, that the illegitimate children of a woman pursuing an unchaste course of life, whether married or unmarried, inherit her property, this custom is not in proof.

If, amongst Sudras proper, a course of decisions, or other evidence of the prevalency of a general custom supported a heritable capacity of illegitimate Hindoos beyond that which the writers' text-books established, these decisions have not been made known, nor has that custom been established. But a title such as the present, so wholly irreconcileable with the expositions of any text-writer, and unsupported by any authority, cannot be established upon the evidence which this case affords. To assume without evidence, on assertion simply, a capacity in the appellant and his uterine brother to inherit to their mother, and assuming that capacity of lineal inheritance to their mother, thence to derive collateral heirship *inter se* to property which never was their mother's, would be at variance with legal principles.

Their Lordships have accordingly felt some difficulty in dealing with this part of

the case. On the one hand, they are not prepared to act upon the opinion of the Law Officers given upon an imperfect statement of facts, unsupported by authority, and apparently not easily to be reconciled with the opinion of the text-writers on the Hindoo Law. On the other hand, they do not feel satisfied that the opinion of the Law Officers may not be well founded, more especially with reference to some local custom or usage. They have come to the conclusion, therefore, that the only safe course which can be taken, is to remit this question to India for further investgation and consideration.

In the course of the argument on the part of the respondents, an objection was taken on their behalf to the title of the appellants as the heirs of Ramaprasad; but this objection does not appear to have been entertained or considered by the Sudder Court and their Lordships very much doubt whether it is competent to the respondents to raise it upon this appeal, having regard to what must have been done in the cause.

Their Lordships, therefore, taking the whole case into their consideration, delivered the foregoing judgment at the close of the sitting after Trinity Term, but they ordered their report to stand over until after the long vacation, in order that the Minutes might be fully considered by their Lordships and by Counsel; and the matter having been again brought before their Lordships on 26th November 1861, the following Minute was finally settled by their Lordships, with the assent of Counsel on both sides, on 30th November 1861:—

"The appellants having by their Counsel consented that the rights of the parties should be considered and dealt with in the same manner as if the respondents had presented a cross-appeal confined to the subject matter of this appeal, *viz.*, the share of Taukooram in the Kadalkoody estate, their Lordships humbly recommended to Her Majesty that the decree of the Sudder Court of 27th November 1856, be reversed, in so far as the same is complained of by the appeal, and that the appeal be dismissed in so far as it complains of the order of 12th November 1857, and that it be declared that the razeenamah in the pleadings mentioned does not prejudice or affect the appellant's claim to Taukooram's share of the Kadalkoody estate, and that the mooktearnamah and the will in the pleadings also mentioned were not genuine instruments; and that it be also declared that the aforesaid reversal of the said decree of the Sudder Court shall not in any way, prejudice or affect the right of the respondents to contest the title of Ramaprasad as the heir of Taukooram to his (Taukooram's) share of the Kadalkoody estate upon any other grounds than those above mentioned, nor prejudice any objection which may be now open to the respondents, and which they may be advised to take, to the title of the appellants as the heirs of Ramaprasad to the said share of Taukooram in the said Kadalkoody estate, and to any application they may be advised to make to the Sudder Court respecting the same; and that it be ordered that the Sudder Court do make all such further inquiry as may be proper and necessary as the title of Ramaprasad as the heir of Taukooram to his (Taukooram's) share of the Kadalkoody estate, and do proceed in the cause as respects that property according to the result of such inquiry; and that it be further ordered that, if it shall appear that Ramaprasad was entitled as the heir of Taukooram to the said share of the Kadalkoody estate, and that the appellants are entitled thereto in right of Ramaprasad, the costs of this appeal be paid by the respondents, and the whole costs in the Sudder Court also be borne by them except the costs of the application for review as to which, in that event, there should be no costs; but that, if it shall appear that Ramaprasad was not entitled as the heir of Taukooram, or that the appellants are not entitled, in right of Ramaprasad, to the said share of the Kadalkoody estate, the whole costs of the case in the Sudder Court be dealt with as the said Court may direct, and that in that event there be no costs of this appeal."

The 27th November 1861.

Present:

Lord Justice Knight Bruce, Sir E. Ryan, Lord Justice Turner, Sir J. T. Coleridge, Sir L. Peel, and *Sir J. W. Colvile.*

Appeal to Privy Council—Valuation of—Complaince with Stamp Regulation—Evidence.

On Appeal from the Sudder Dewanny Adawlut at Calcutta.

Mohun Loll Sookul and others,

versus

Debee Doss Dutt and others.

In this case the Privy Council originally gave leave to appeal, provided satisfactory evidence were supplied by the appellants to the Registrar to the Sudder Court that the real or market value of the land in dispute exceeded 10,000 rupees. This order was subsequently discharged as obtained upon an incorrect statement of the facts. It appearing afterwards that the appellants had satisfied the Registrar that the real or market value of the land exceeded 10,000 rupees, the appeal was restored with a general suggestion that the terms of the Bengal Stamp Regulation X of 1829 upon the subject of value should be carefully attended to.

The respondent asked that she might be at liberty to go into evidence on the question of value. This was refused, the original order having been carefully and designedly confined to evidence to be adduced by the appellants, with a view to prevent the introduction, for the purpose of a merely fiscal. Regulation, of a contested issue on the question of value—a result which ought in all cases, as far as justice will permit, to be avoided.

In this case leave to appeal was granted by an order of the 22nd February 1860; but it was provided by the order that the leave to appeal should be null and of no effect unless satisfactory evidence should be supplied by the appellants to the Registrar of the Sudder Court, that the real or market value of the land in dispute exceeded the sum of 10,000 rupees. By an order of 26th June 1861, the order of 22nd February 1860 was discharged. The application now before us is to restore the appeal, and to discharge the order of 26th June 1861, with costs.

The petition on which the order of 22nd February 1890 was made, alleged that the real or market value of the land in dispute exceeded the sum of 10,000 rupees, the prescribed limit under which the Sudder Court has no power to grant leave to appeal; but that the amount laid in the plaint as the value of the suit for the fiscal purposes being only 3,572 rupees 10 annas 9 pies, three times the amount of the Sudder jumma, or rent, the petitioners were prevented by the rules of practice of the Sudder Court from obtaining therein the leave to appeal.

The petition on which the order of 26th June 1861 was made, alleged that the respondent, in her answer, insisted that the suit ought to have been valued according to Regulation X of 1829, that is, at the real or market value of the land, and that the appellants after this answer filed a supplemental plaint, stating that the suit had been, by mistake, valued at three times the Sudder jumma, and that it should have been valued at 4,300 rupees, the real or market value of the land, but that the stamp being sufficient to cover a claim of 5,000 rupees, no objection could exist on that head; and this petition further stated that the petition on which the order of 22nd February 1860, was made, had omitted to state the respondent's answer and the supplementary plaint, and it also stated that the real or market value of the lands did not exceed the sum of 10,000 rupees.

In this state of circumstances, it was of course, to discharge the order of 22nd February 1860, that order having been obtained *ex-parte*, and appearing to have been obtained upon an inaccurate statement of the facts, and the order was discharged accordingly: but it being considered that there had been no intentional misrepresentation on the part of the appellants, the order of 26th June 1861 by which it was discharged, was made without prejudice to any further application by the appellants on notice to the respondents.

The case, therefore, now comes before us unprejudiced by what passed on the previous applications, and it now appears that the supplementary plaint did not allege the 4,300 rupees to be the real or market value of the land, but stated it to be the auction-price of the land, refering, of course, not to any then present auction, for there was none, but to some past auction at which the property had been bought, and meaning, no doubt, to refer to the auction mentioned in the plaint; and it farther appears that the appellants have laid before the Registrar of the Sudder Court satisfactory evidence that the real or market value of the land exceeds 10,000 rupees.

As the case now stands, therefore, there was no fraud practised upon this Court in obtaining the order of 22nd February 1860, and the condition on which that order was granted has been fulfilled. There would seem, therefore, *primâ facie*, to be no ground for now refusing to restore the appeal.

But it was said for the respondents that the value of the land in dispute was untruly stated in the plaint in fraud of the Revenue Laws of India, and that leave to appeal ought not, therefore, to be granted. Their Lordships are far from saying that, if they were satisfied that any such fraud was intended, they would be disposed to grant the least indulgence to any party in any way participating in it, but in this case they are satisfied that, whatever misapprehension there may have been, there was no such fraud intended. It was a mistake on the part of the Court, no less than of the

appellants, to allow the cause to proceed upon such a representation of the value as was contained in the supplementary plaint, and their Lordships take this opportunity of suggesting that the terms of the Regulation upon the subject of value should be carefully attended to. They think that, as this case now stands, the order applied for cannot be refused upon the ground suggested.

It was asked by the respondent that she might be at liberty to go into evidence on the question of value; but their Lordships are not disposed to deviate in this respect from their original order, which was carefully and designedly confined to evidence to be adduced by the appellants, with a view to prevent the introduction, for the purpose of a merely fiscal Regulation, of a contested issue on the question of value, a result which, in their Lordships' judgment, ought, in all cases, as far as justice will permit, to be avoided.

The petition before us asks that the order of 20th June 1861, may be discharged with costs, but their Lordships think that there should be no costs on either side.

The order, therefore, which their Lordships will humbly recommend to Her Majesty to be made on this application, will be simply to discharge the order of the 26th June 1851, and to restore the appeal.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

The 29th July 1863.

Present:

Lord Kingsdown, Lord Justice Knight Bruce, Lord Justice Turner, and Sir L. Peel.

Onus probandi—Inheritance—Legitimacy.

On Appeal from the Sudder Dewanny Adawlut at Calcutta.

Khajah Mahomed Gour Ali Khan,

versus

Ashruffoonissa and others.

The plaintiffs having to prove not only their relationship (which was not disputed), but their heirship (which depended upon the illegitimacy of the defendant), were held bound to give sufficient general evidence in support of their case, to throw upon the defendant the onus of proving his legitimacy.

It is with great regret that their Lordships in this case find themselves unable to dispose of the case upon the evidence as it stands.

The facts on each side are such that they must, from their very nature, be capable of clear and distinct proof. If Abdool Kadir Khan, *alias* Wuzur Jan, was the miserable object which has been described by the Respondents, it must have been a fact known not only to all the members of the family, but to the medical men who attended him, and to all respectable people in the neighbourhood who were in the habit of associating with him. On the other hand, if he was a married man, and contracted a legal marriage with Alla Rukhee Begum, as is alleged, and the son of that marriage lived in the family, and on the death of the father was acknowledged as his heir, that is a fact which must be equally capable of proof. Unfortunately, the witnesses on both sides are of such a character that it is impossible for the Court to place any reliance upon their testimony.

The Judge of the Zillah Court has pronounced in the strongest terms his opinion that the appellant in this case is entitled, and that the case against him is a conspiracy. But, instead of stating the grounds upon which he arrived at that conclusion, he confines himself to alleging that as his opinion, and that he has no doubt about it. He has not afforded to the Court that assistance which it is entitled to expect, and which I believe by the Regulations he is bound to afford. On the other hand, we cannot say that the Sudder Court has proceeded in a manner which is entirely satisfactory. They hardly seem to have allowed sufficient weight to the circumstance that the respondents (who are the plaintiffs) were the party who had to make out the case. They have not only to prove their relationship, which is not disputed, but their heirship, which depends upon the illegitimacy of the appellant; and they must give sufficient general evidence to throw upon him the onus of proving his legitimacy.

Their Lordships therefore, must advise Her Majesty to remit the case to India. Probably the proper order will be, to affirm the decree of the Sudder Court, so far as it reversed the decree of Zillah Judge; to reverse the Sudder decree in other respects: and to remit the cause to the Sudder Court, with directions that they shall send it back to the Zillah Court to receive such further evidence as either party may offer, and to proceed afterwards to the regular hearing and adjudication of the cause.

There will be no costs in this appeal.

Khajah Mahomed Gour Ali Khan vs. *Kahjah Ahmed Khan.*

With respect to the decision in this case, it must stand over until the result of the proceedings in the case of "Khajah Mahomed Gour Ali Khan *versus* Ashruffoonissa and others" is known, the appellant being the same in both cases.

If the appellant should not make out any title in the other case, he will have no interest in this.

The 23rd July 1864.

Present:

Lord Justice Knight Bruce, Lord Justice Turner, Sir J. T. Coleridge, Sir L. Peel, and Sir J. W. Colvile.

Sale of Estates for arrears of Government Revenue—Under-tenures—Cancellation of Enhancement of rent.

On Appeal from the Sudder Dewanny Adawlut at Calcutta.

Ranee Surnomoyee, Widow and Heiress-at-law of the late Rajah Kristonauth Roy Bahadoor,

versus

Maharajah Sutteschunder Roy Bahadoor, Son and Heir-at-law of the late Maharajah Sreeschunder Roy Bahadoor.

The object of Section 5 Regulation XLIV of 1793, taken together with Section 7, was not the destruction of the under-tenures upon the sale of the parent estate for arrears of Government Revenue. It only empowers the purchaser at such sale to avoid the subsisting engagements as to rent, and to enhance the rent to that amount at which, according to the established usages and rates of the Pergunnah or District, it would have stood, had the cancelled engagement so avoided never existed.

Quære.—Whether such a power is given only to the purchaser or to him and his heirs, or whether it is a power attaching to the zemindary and passing to subsequent purchasers.

THIS was an appeal from a decree of the Sudder Dewanny Adawlut at Calcutta of the 26th of March 1859, from a decree of the Judge of the Zillah Court of Nuddea, in Bengal, of the 21st July 1858, confirming substantially a decree of the Principal Sudder Ameen of Nuddea, in Bengal, of the 19th of November 1857. The suit was originally brought by the respondent's father; and the relations of the parties to each other were those of zemindar and talookdar, the appellant holding as mesne tenant a portion of the zemindary. The object of the suit is to enhance the rent at which the appellant holds that portion; and no question is made upon the respondent's general title, nor upon the relation in which the appellant stands towards him. She does not dispute his right under other circumstances to bring this sort of action against her; and their Lordships, therefore, do not enter into the question, whether the action has been properly so brought. They give no opinion on that point. What the appellant insists upon is that this present action must fail, because her tenure is hereditary and at a fixed rent, which the zemindar has no power to enhance.

It will be convenient in the first place to state what, upon the evidence, their Lordships consider to be established as to the appellant's title, omitting for the present some parts of the evidence on which she relies, and to which too much importance has been, as it appears to their Lordships, attached in the Courts below. The interest, which she represents, was first created by grant in favor of a Mr. Alexander Seaton at some date prior to the commencement of this century. On parts of the land comprised within his grant, he laid out gardens and erected Factories, and other buildings; but there is no direct evidence that the grant was made for these purposes. He appears to have been a Civil Servant of the East India Company; and after some years, when leaving India for England, he sold the whole property to the grandfather of the appellant's husband; on his death, it descended to the father, and thence in due course to her husband, from whom she has inherited it as his widow. A portion of the land, during the course of years, has been granted to the Government, and a public College erected thereon. And during the whole time of the occupation of these five tenants, the same rent has always been paid. Upon this state of facts, the appellant contends that she is not merely a mouroosee tenant, that is, one holding by hereditary tenure, but that she holds at a fixed rent, and under such circumstances as protect her from any enhancement of it.

The state of facts on the part of the respondent is this:—It appears that while Hurreenath Roy Bahadoor, the father of the appellant's husband, was in possession, the Government Revenue payable by the zemindary fell into arrear, and the property was therefore put up to public auction; one Modoosoodun Sandial became the purchaser, and he acquired the rights which the then subsisting Regulations gave to a purchaser at such a sale. After some time he sold the zemindary by private contract to one Mr. Harris, from whom on his death it passed to his widow Mrs. Helen Harris; from her it was purchased by the Maharajah Sreeschunder Roy, now deceased, who in August 1856 commenced the present suit, and on his death the respondent, inheriting the zemindary, has continued it.

Upon this state of facts the respondent contends that, as he claims under Modoosoodun Sandial, he has acquired all rights which Modoosoodun Sandial had; and that as *he* purchased at Government auction, he was entitled by the Regulations then in force to cancel the lease under which the appellant's ancestor was holding, and of course to impose new terms as to the rent.

It is, as it seems to their Lordships, necessary to the respondent's success, that Modoosoodun Sandial should have had in him, at the time when he sold to Mr. Harris, the rights above stated, so that he himself might at that time have enhanced the rent of these lands; that these rights should have passed

to Mr. Harris, and the subsequent purchasers of the property down to and including the respondent's father; and that they either could not have been or have not been in fact waived by the respondent's father or by any one of the prior owners, for, unless this be the case, their Lordships see no ground on which the hereditary tenure could be disturbed or the rent enhanced.

The reliance of the respondent is on some one of the Regulations which have been made at different times in regard to purchasers at Government auction sales in the case of zemindaries from which the Government income has not been duly paid. These regulations have been couched in different language, but all with the same policy in view as regards the present question. It has been assumed, as the foundation of them, that the default of the Zemindar may have been occasioned by improvident grants of Talooks and other subordinate tenures at inadequate rents: that this was in breach of the condition on which the fund was originally created by the Sovereign Power; and the purchaser, therefore, has been set free from the obligation of these grants, with certain specified exceptions, and with certain limitations of his power as to new tenancies to be created. These laws, however, cannot but occasionally operate very hardly on the grantees of subordinate interests; and they have, therefore, been materially modified by an Act of 1859, not in force when this decree was made, and not, therefore, directly applicable to it; but such Regulations must on general principles receive a strict construction. There seems to have been doubt in the minds of the respondent's advisers on which of these Regulations his case could safely be rested, and it would appear from the proceedings in the Court below, that it was intended to rest it on a Regulation, Act I of 1845, which certainly would not have supported it, because the sales relied on was not affected under that Regulation, and its provisions are limited to sales so effected. Upon the argument before their Lordships, the Counsel for the respondent relied on the 5th Section of Regulation XLIV of the year 1793, which is the earliest of the Regulations on this subject; and they contended that, although subsequent Regulations upon the subject have been passed in different language and repealed, this 5th Section of Regulation XLIV of 1793 has never been repealed, but was in force at the time when the sale in question was made and this action was commenced. Whether, upon the true construction of all the Regulations taken together, this particular Section ought to be taken to have been repealed or not, their Lordships do not think it necessary to determine. They assume in favor of the respondent that it stands unrepealed and in full force, and will deal with the case upon that footing. The language of this Section is no doubt favorable to the respondent's case. It provides that, when a zemindary is sold at a public sale for discharge of arrears due from the proprietors to the Government, "all engagements which *such proprietors* shall have contracted with dependent Talookdars, as also all leases to under-farmers and pottahs to ryots, *shall stand cancelled form the day of sale*, and the purchaser shall be at liberty to collect from such Talookdars, and from the ryots, whatever the former proprietors would have been entitled to demand according to the established usages and rates of the perguniah or district in which the properties lie, had the engagement so cancelled never existed." But the 7th Section of this same Regulation XLIV of 1793 provides, that this is not to authorize the assessment of any increase upon the lands of such dependant Talookdars as were exempted from increase at the Decennial Settlement of 1793.

Their Lordships do not, upon any evidence in the case on which they think it safe to rely, see their way to the belief that the appellant brings her case within the 7th Section; but they cite it because it may have a bearing on the construction of the language of the 5th Section. The respondent contends that, by the operation of the words "stand cancelled from the day of sale," the existing interest of the Talookdar *ipso facto* ceased to exist, without any act done by the purchaser, that it was incapable of confirmation or being set up by him or his successors; and that where, from the acquiescence of the purchaser or those claiming under him, the possession had remained in the talookdar, and those claiming under him undisturbed, and the original rent had been received, no matter for how long a period, or through whatever number of mesne conveyances, it still remained a bare possession at the will of the zemindar for the time being, and the rent always liable to enchancement. In this hard and literal construction of the words cited above, their Lordships do not concur. They think that their meaning is properly to be collected from the policy and intent of the Regulation, from the language used in other parts of the same Section, and

from the 7th Section which creates an exception out of the provisions of that Section. English lawyers are familiar with this principle of construction applied as early as the time of Lord Coke (*see* 1st Inst, 45), to the disabling Statute of 1 Eliz. cap. xix, sec. 5, and in several modern reported cases between landlord and tenant, on clauses of forfeiture in leases. Words which make a bishop's grant "utterly void and of none effect to all intents, constructions, and purposes," have been held not to prevent the grant from being good and binding on the grantor, and in some cases confirmable by the successor; and so a proviso in a lease that it *should be void altogether* in case the tenant should neglect to do a certain act, has been held only to make it voidable at the option of the landlord. Their Lordships do not cite these as authorities governing this case, but mention them only as illustrating a general principle of construction which for its justice, reasonableness, and convenience, must be considered of universal application. In the present case the object of the Government was that the jumma should be duly paid, and that the means of paying it should not be withdrawn by the improvident grants of the zemindars who had made default; but cases of default might often arise where no improvident grant had been made, where the talookdars and the ryots held at proper rents, and the default was owing to extravagance, mismanagement, or other causes,—in such cases the Government cannot be supposed to have intended a wanton and unjust disturbance of vested interests. It is true that the Section makes no distinction in terms between the two classes of cases, and it would be unsafe in construction to make any such; but the consideration furnishes reason for such limitation, both as to time and extent of operation, as the words will admit, indeed seem to require, in order to give effect to the whole sentence. Now, looking at what follows in the same Clause, it is obvious that no such absolute cancellation was intended, for the power expressly and affirmatively given to the purchaser supposes the talookdars and the ryots to remain in all respects as before, except that they become liable to a certain limited increase of rent, "according to the established usages and rates of the pergunnah or district;" words in themselves showing that the Section was directed to cases in which grants had been made with reservations of rent below those usages and rates. It is to be observed also that, in terms, this power is given only to the purchaser himself, which would ordinarily suffice to remedy the mischief in contemplation. The language of the exception, too, in Section 7, shows that what was aimed at by Section 5, was not the destruction of tenure, but the increase of rent, under certain specified and equitable limitations.

The conclusion at which their Lordships have arrived as to the construction of the Section is this—that a power was given by it to the purchaser, at a Government sale for arrears, to avoid the subsisting engagements as to rent, and to increase the rent to that amount at which, according to the established usages and rates of the pergunnah or district, it would have stood had the cancelled engagement so avoided never existed. This gives it a just and reasonable operation, and virtually it would have had none when the existing rent was already according to the usages and rate of the pergunnah.

This conclusion is of great importance in the determination of the remaining questions. The sale to Modoosoodun Sandial, according to the respondent's own case, took place sometime before 1823, and he found those under whom the appellant claims holding the land at an old rent of 64 Rupees 1 anna 12 pies; he did not attempt to disturb the occupation or increase this rent, but received it during all the time he remained owner. He sold by private contract to Mr. Harris, from whom it passed to his widow, Mrs. Helen Harris, and from her again by private contract to the respondent's father, Maharajah Sreeschunder Roy, as has been already stated. During all this time (and for a considerable period before, so far as appears indeed from the very creation of the tenure—more than sixty years ago), the same rent has always been paid; and there is no evidence that when first imposed, nay, even when the purchase was made, it was not a perfectly adequate rent for the property. Great changes in the value of property have now arisen, and the respondent demands by his plaint an annual rent of 1,470 Rupees, or nearly twenty-three times the amount of the original rent, according, as he states it, to the actual rate current in the village.

If the Section in question did not authorize the purchaser to disturb the possession, and left him an option to confirm the existing rate of rent, there seems to be the strongest evidence that he exercised that option in favor of the talookdar; and even if the same rights passed from him unim-

paired to Mr. Harris, and in succession to those who claim under him, the evidence is equally strong: nay, as regards Mr. Harris personally, it is stronger. It is, therefore, unnecessary to decide whether the Section is to be construed as giving a power only to the purchaser, or to him and his heirs, or a power attached to the zemindary which passed to subsequent purchasers. Their Lordships, moreover, observe that the power given is to collect what the *former proprietor* would have been entitled to demand, if the cancelled engagement had never been made; words which seem to point to something to be done on the change of ownership, not to something to be done after any indefinite lapse of time; and, as before remarked, in terms the power is given only to the purchaser himself, as to whom reasons might apply which would not extend to subsequent purchasers from him. Their Lordships, however, pronounce no opinion on this question, it not being necessary to decide it. They say no more than that a construction which would render the title to property unnecessarily uncertain, ought not in their judgment to be given to a power of this description.

On examining the Regulations, their Lordships are satisfied that the respondent's case can rest only on the powers given by the Section in question; and they are of opinion that those powers, assuming them to be in force, will not support the present action. They are glad to find that it is not their duty to support a claim which appears to them to be unjust. During the long period for which this property has been held at a small unvarying rent, it has been bought and sold, and changes and improvements have been made, no doubt, at a considerable expense, and upon the faith of the render to the zemindar continuing unchanged: he has purchased while that state of things existed, and it must be presumed for a price calculated accordingly; and it is manifestly unjust that he should be allowed to disturb it.

It will have been observed that their Lordships have arrived at their conclusion without considering either the parol evidence of the appellant, or a confirmatory pottah produced by her as having been granted by Modoosoodun Sandial, which, if received by the Courts below, would have concluded the case in her favor. Both these Courts, however, treated the whole of the parol evidence as unworthy of credit, and the pottah as a forged instrument; and their Lordships regret that on the fullest consideration they are not prepared to differ from them in these conclusions. When false witnesses or forged documents are produced in support of a case, the fact naturally creates suspicion as to the case itself; and if the evidence on which their Lordships act depended in any decree for its credibility or weight on such witnesses or document, they would have paused as to their conclusion. The fact is not so, however, in the present case; their Lordships believe they have to deal with a just case foolishly and wickedly attempted to be supported by false evidence. This misconduct must not mislead them in the advice they will have to render to Her Majesty, which will be that the appeal be sustained, the decrees complained of reversed, the plaint in the suit dismissed, and any costs which may have been paid by the appellant in the Court below refunded but that no costs of the appeal, or of any of proceedings below, be allowed to the appellant.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

The 19th July 1862.

Present :

Lord Kingsdown, the Judge of the Admiralty Court, Sir E. Ryan, Sir L. Peel, and Sir J. W. Colvile.

Decision not to be appealed from in consiquence of subsequent event or devolution of interest—Averments not traversed necessarily not admitted—Decrees of Indian Courts (Interference with, by Privy Council).

On Appeal from the Sudder Dewanny Adawlut at Calcutta.

Anundmoyee Chowdrain,

versus

Sheeb Chunder Roy.

No subsequent event or devolution of interest can affect the decision of a question as it stood at the time the decision was pronounced. To give effect to these, some supplementary proceeding, and not an appeal, is necessary.

The strict rule that averments not traversed must be taken to be admitted, is not applicable to the Indian Courts.

The Privy Council thought it objectionable to disturb or vary decrees properly made by the Zillah and Sudder Courts in this suit, for the mere purpose of guarding against the possible error of some other tribunal in some future suit.

THE appellant is the widow of one Kirtee Chunder Chowdry, who died in 1828, leaving two sons. The elder, Juggut Chunder, died a few months after his father, unmarried and intestate. The younger, Bhoobun Chunder, died in December 1844 a minor, and childless, but leaving a widow, Huromonee. Shortly after his death, Huromonee, under an *Unoomutty puttur* or authority to adopt, which she alleged her husband had executed in her favor, on the night of his death, adopted one Grish Chunder as the son and representative of Bhoobun Chunder. And in 1847, the appellant who disputed Huromonee's right to adopt, set up an *Unoomutty puttur* which she alleged had been executed in her favor by Kirtee Chunder Chowdry on the 20th of May 1828, and, under that instrument, adopted the son of one Neelkunth Gooptoo as the son and representative of her husband Kirtee Chunder, and gave him the name of Bhairub Chunder Chowdry.

These rival adoptions gave rise to two suits, which it will be convenient to distinguish by the numbers 316 and 317, by which they were known in the Sudder Dewanny Adawlut.

No. 316, in which the present appeal is presented, was instituted in 1849 on behalf of Bhairub Chunder Chowdry, a minor, by his natural father Neelkunth Gooptoo, as his well-wisher or next friend, against the present appellant Huromonee, and several other persons as defendants. The plaint stated the execution of the *Unoomutty puttur* by Kirtee Chunder; the adoption of the infant plaintiff under it; his title, by virtue of that adoption, to one-third of the estate of Kirtee Chunder in immediate possession and to the other two-thirds, subject, as to one of them, to the interest of the present appellant as heiress at law of her eldest son; and subject, as to the other, to the life-interest of Huromonee as heiress of her husband. And it claimed the possession of one-third of the zemindary and some personal property as against the two female defendants with wassilat; and as against Huromonee, the cancelment of the adoption made by her as illegal. The other defendants had no interest in the property, and seem to have been made defendants only because they had taken part in the adoption by Huromonee. To this suit, therefore, the appellant, though no doubt a friendly, was a substantial, defendant.

Shortly before the institution of No. 316 Huromonee had commenced the suit No. 317. The only defendants to this were the appellant and another woman. It set up the adoption made by Huromonee, and claimed by virtue of that, and other acts of the appellant, the whole of the property as against her, disputing the adoption made by her. In this suit the appellant pleaded the *Unoomutty puttur* alleged to have been executed by her husband, and insisted on the validity of the adoption made by her under it.

Huromonee died before either suit came to a hearing, and certain proceedings were had by which Grish Chunder Chowdry, the infant adopted by her, became, through his well-wisher or next friend, a defendant in No. 316, and the plaintiff in No. 317.

The two suits were heard together by the Principal Sudder Ameen, in whose Court they were pending. In No. 317, he decided in favor of the plaintiff Grish Chunder, affirming the validity of his adoption by Huromonee; treating the *unoomutee puttur* set up by appellant as not established by proof, and the adoption thereunder as invalid. Upon the same grounds he decided against the title of Bhairub Chunder in No. 316, and dismissed that suit with costs.

Appeals were preferred to the Sudder Dewanny Adawlut against both decisions. That in No. 316 was, in the first instance, an appeal on behalf of the infant plaintiff Bhairub Chunder, by his father and well-wisher. The appeal in No. 317 was that of the present appellant.

Before the appeals were heard, Bhairub Chunder died; and the present appellant (being, on the assumption of his adoption being valid, his heiress-at-law) seems, on her own application, to have been substituted for him as appellant in No. 316, notwithstanding her character as defendant in that suit. She thus became regularly or irregularly, *domina litis* in both appeals.

These appeals were heard by the Sudder Dewanny Adawlut in 1855. In No. 317 the Court reversed the decision of the Principal Sudder Ameen, mainly on the ground that Bhoobun being an infant at the time of his death, had no power to make the instrument under which Huromonee claimed the right to adopt, without the consent of the Court of Wards; and therefore that the adoption of Huromonee under it was wholly void. Against that decision there has been no appeal.

In No. 316, the Court dismissed the appeal, and confirmed the decision of the Zillah Court, holding that the *unoomotee puttur* under which the appellant adopted Bhairub Chunder had not been proved, and was wholly unworthy of credit. Against this decision, and that of the Court below, the present appeal is proposed.

The decision in No. 317 has determined the interest of the party claiming under the adoption by Huromonee; and the various deaths that have occurred, have vested the whole interest to the estate, at least during her life, in the appellant. It is not therefore surprising that the present appeal has come on *ex-parte*. Their Lordships, however, do not the less feel the difficulty in which every *ex-parte* appeal places them, of having to decide the questions raised after hearing one side only.

The first and most important question is, whether the decision of the Principal Sudder Ameen was, when pronounced, a correct decision of the issues then pending before him between the then parties to the suit? No subsequent event or devolution of interest can affect this question; because, to give effect to these, should justice require it, would be the office, not of an appeal, but of some supplemental proceeding.

The question in the suit was the title of Bhairub Chunder, as the adopted son of Kirtee Chunder, to recover certain property, and to have another adoption cancelled. The foundation of this title was the *unoomotee puttur* under which he was adopted. If the proof of that failed, he had no title, and his suit was properly dismissed.

It is not now contended that there is before their Lordships, or was before the Principal Sudder Ameen, testimony strong enough to establish the validity of the instrument if impugned. But it is argued that the evidence which the Principal Sudder Ameen treated as too weak for that purpose was irregularly taken, because it was taken in No. 317, to which Bhairub Chunder was not a party. It is further argued that proof of the instrument by witnesses was unnecessary, because the answer of Huromonee did not impeach, and must, therefore, be taken to have admitted its validity. These two objections shall be considered separately.

Their Lordships are not satisfied that the depositions of the witnesses examined in support of the *unoomotee puttur* (which are not before them) were not substantially taken in both the suits, which were clearly tried together. At page 73, line 33 of the Appendix, the father and next friend of Bhairub Chunder, in his reasons of appeal, comments on this evidence; and at the hearing in the Sudder Dewanny Adawlut the appellant's Counsel argued upon it. But suppose it to be out of the case, what is the result? Why, that the plaintiff has given no evidence whatever in support of an averment material to his title. The only question that can remain is whether there has been an admission of that averment sufficient to relieve him from the necessity of giving any such evidence.

Their Lordships cannot answer this question in the affirmative. The answer of Huromonee denies generally the truth of the plaintiff's case. If it does not directly impugn the instrument, it does not in terms admit it. The defence is no doubt mainly

directed to the avoidance of the adoption by the appellant by setting up the adoption made by the defendant Huromonee; but it does not admit that, if the latter adoption fails, the other is necessarily valid.

Their Lordships cannot apply to the pleadings in these Courts the strict rule that averments not traversed must be taken to be admitted; and they are not prepared to say that the answer contains an admission which, even as between the plaintiff and Huromonee, would have dispensed with the necessity of proving the instrument. But when the case was heard, the issue was no longer one between the plaintiff and Huromonee. She was dead, and Grish Chunder has been admitted as a defendant on the record. He did not come in as the heir of Huromonee, for, if he were duly adopted, his title was paramount to hers. He would not then have been bound by her admissions of an instrument (even had they been more unequivocal than they are) the execution of which had been formally made one of the issues in the suit. Their Lordships, therefore, can see no ground for disturbing the decree of the Principal Sudder Ameen.

The next question is, whether any case has been made for reversing or varying the decree of the Sudder Dewanny Adawlut. It has been argued that the substitution of the appellant for Bhairub Chunder, which made her both plaintiff and defendant in the suit, was grossly irregular. It may have been so, but it was an irregularity of her own seeking. If she had not taken up the appeal, it must either have been prosecuted by the well-wisher and next friend of the deceased infant (if the forms of the Courts permitted this), or abandoned by him. Their Lordships must assume that the decree of the Zillah Court, which they think to be correct, would, in either case, have stood. The appellant on her own application has been allowed, perhaps irregularly, to contest the correctness of that decree. She has done so unsuccessfully, and it is but fair that she should be left to pay the costs of the proceedings.

The appellant is now entitled, as a Hindoo female heiress, to the whole estate; if she makes any further adoption, the validity of that adoption will be probably tried between the party adopted, and those who will be the heirs of her husband on her death. In any such suit, it is difficult to see how these decrees can be admitted as evidence for the purpose of showing the invadility of the instrument of adoption.

At any rate, their Lordships think it would be objectionable to disturb or vary decrees properly made by the Zillah and Sudder Courts in this suit, for the mere purpose of guarding against the possible error of some other tribunal in some future suit, and the only order which they can recommend Her Majesty to make on this appeal is, that it be dismissed.

The 27th April 1863.

Present:

Lord Justice Knight Bruce, Lord Justice Turner, Sir J. T. Coleridge, Sir L. Peel, and Sir J. W. Colvile.

Privilege of administering Purohitam to Pilgrims resorting to Ramaswaram.

On Appeal from the Sudder Dewanny Adawlut at Madras.

Ramasawmy Aiyan and others,

versus

Venkata Achari and others.

Suit for the exclusive right in the privilege of administering Purohitam to pilgrims resorting to Ramaswaram. As the privilege claimed was admitted to be capable of alienation or delegation, it was held that texts to the effect that the efficacy of the right depended on the character of the ministering priest, necessarily lost their value; and that the principle of alienation or delegation greatly increased the difficulty of proving the continued enjoyment of the privilege, supposing that it ever existed. The Privy Council observed that functions inseparably annexed by the authority of sacred books to a particular order of men will be recognized, preserved, and perpetuated by the religious sentiment of succeeding generations; but that the privilege of exercising those functions, when alienable for money, ceases to be the subject of religious sentiment, and becomes a mere proprietary right; and that every long-continued enjoyment of the privilege by others is of course capable being ascribed to a presumed grant or alienation of which the direct evidence is lost.

On the merits, the appellants were held to have failed to support their claim by any sufficient evidence.

THE subject of litigation in this case is the right of administering what is called Purohitam to seventeen classes or castes of the numerous pilgrims who resort to the great Pagoda and other temples in the Island of Ramaswaram.

The appellants, the plaintiffs in this suit, sue, and the respondents are sued, as representatives of the bodies to which they respectively belong. Whilst, however, the respondents are all members of an homogeneous class, described indifferently as Tadwadi and Telegu Brahmins, or as Pari-

shai Bhatters, resident in and about Ramaswaram; the appellants are some of them Arya Brahmins, and others Gurukals; the differences between these two latter classes, their rights and privileges, being some of the matters involved in the question at issue in this suit.

The case put forward by the appellants, is shortly this. They assert that, ever since the first foundation of the Pagoda, an event which they ascribe to a very remote age, the Arya Brahmins possessed the privilege, and that an exclusive privilege, of administering Purohitam to all classes of pilgrims resorting to Ramaswaram. They treat, however, this privilege as alienable, or at least capable of delegation; and state that by an instrument bearing a date which it is now agreed corresponds with A. D. 1675, the Arya Brahmins have, in consideration of an annual payment of 50 pons, transferred to a community called the Adhyena Bhatters the privilege of administering Purohitam to seven specified classes of pilgrims; and in some way or another, and at some uncertain but distant date, have conferred the some privilege over ten other classes of pilgrims upon the community of the Gurukals. They further state that the Gurukals again transferred the privilege, as to six of those ten classes, to the body represented by the respondents, which it will be convenient to distinguish as Parishai Bhatters, on the condition that the latter would account to them for 20 per cent of the emoluments derived from the exercise of the right; that a dispute having arisen between these two last-named bodies, an arbitration took place A. D. 1726, which resulted in the execution of the instrument set forth as Exhibit E. or No. 41 at page 29 of the Appendix; and that difficulties having subsequently occurred in carrying that arrangement into effect, the payment of 20 per cent on the collections was commuted for a fixed annuity of 100 pons, which, by the instrument F. or No. 43 (set forth at page 30 of the Appendix), the Parishai Bhatters some time about A. D. 1762 agreed to pay, and did, in fact, pay up to the year 1825 to the Gurukals. The appellant's plaint, after stating these facts, notices the proceedings in a suit (No. 232 of 1826) in the Moonsiff's Court, the effect of which their Lordships will consider when they come to deal with the evidence. It also states the effect of a copper-plate deed (No. 74 at page 57 of the Appendix), by which in A. D. 1714, the then zemindar of Ramnad granted certain dues payable to him by the Parishai Bhatters, and amounting to 90 pons, to a particular goddess in the pagoda on account of the Friday services. It also states some proceedings before the Collector in 1835, when that officer endeavored to compose the strife which had long existed between these rival sects of Brahmins, by an order which, as appears from the order itself, No. 80, at page 62 of the Appendix, affirmed the rights of the Parishai Bhatters to administer Purohitam to twenty-one classes of pilgrims, subject to the payment into the Pagoda of 190 pons annually; being the 90 pons for the Friday services, and the 100 pons payable to the Gurukals. This order assumed that the right of the Parishai Bhatters as to seventeen of their classes was not in dispute, and it left either party, if dissatisfied with it, to bring a civil suit. The plaint then shortly notices the proceedings in a suit of 1835, which was brought by some of the Arya Brahmins against some of the Parishai Bhatters in respect of two of the classes comprised in the Collector's order, and was dismissed by a decree of the Zillah Judge, dated the 27th of June 1840; a decree confirmed on appeal by the Provincial Court on the 28th of December 1841. It then explains that the claim in the present suit is limited to seventeen of the twenty-one classes comprised in the Collector's order, because the remaining four belong to the Adhyena Bhatters under the deed of 1695; and further, that whilst the claim as to eleven of the seventeen classes is general, as to the remaining six, which were the subject of the instruments of 1726 and 1762, it is limited to the enforcement of the rights of the Gurukals under the latest of these documents. The particular relief prayed is a decree for the payment of rupees 2,916-10-8 being the arrears for twenty-three years of the annuity of 100 pons payable to the Gurukals in respect of the six classes of 4,400 rupees by way of damages incurred in respect of the other eleven classes: for a declaration that the Purohita Mirassi of the eleven classes is henceforth to be enjoyed by the Arya Brahmins without the interference of the Parishai Bhatters; and for an order that the Parishai Bhatters do regularly pay the 100 pons to the appellants and other Aryas and the Gurukals, or otherwise that the Mirassi as to these classes also is to be enjoyed by the appellants and other members of the Arya Mahajanum and the community of the Gurukals, without the interference of the Parishai Bhatters.

The case set up by the respondents in opposition to that of the appellants is, that their ancestors were established in the place or neighbourhood, and invested with the privilege of administering Purohitam to pilgrims resorting to Ramaswaram, by a certain Rajah, about 1,000 years ago; that they afterwards from generation to generation enjoyed this privilege, and the emoluments resulting from its exercise, and so acquired the title of Parishai Bhatters; that the zemindars of Ramnad imposed an annual tax upon them of 160 pons payable out of their receipts, which they continued to pay until the time of one Vijaya Raghundha, who granted 100 out of the 160 pons to the community of the Gurukals on their complaint of having no income in the Pagoda, and afterwards granted the remaining 60, with some other dues payable by the Parishai Bhatters (making 90 pons in all), for the Friday services of the Pagoda.

They treat the latter grants as made by the copper-plate deed of 1714; do not show in what precise form or by what instrument the first was made; and assert that after 1714 the whole of the 190 pons was paid into the Pagoda. They state that in 1827 there was an attempt to settle the disputes between their community and that of the Arya Brahmins by a native punchayet (the failure of which is much to be regretted); that afterwards, in the course of an enquiry before the Sub-Collector, the Aryas admitted that in respect of seventeen classes, there was no dispute as to the right of the Parishai Bhatters, and that the Collector's order of 1835 was made on that admission. They further insist strongly upon the decrees in the suit of 1835 as a bar to the present suit, which they also contend is barred by the Regulation of Limitation.

The issues settled in this suit (see Appendix p. 24,) threw upon the appellants the burthen of proving, *first*, the hereditary and exclusive right of the Arya Brahmins to administer Purohitam to all castes of people frequenting Ramaswaram as pilgrims, and their ancestor's enjoyment accordingly; *secondly*, the grant, as alleged by way of dowry, of the ten castes to the Gurukals, and that the Parishai Bhatters had since rented from the Gurukals six of the ten castes, undertaking to pay them annually two-tenths of the emoluments under a written document which had been acted upon; *thirdly*, that under another document this liability had been commuted for an annual payment of 100 pons, and that the latter had been paid up to 1825; and *fourthly*, that the defenders had taken illegal possession of the eleven other castes, and that with the exception of these and the castes held by the Adyhena Bhatters all other castes were enjoyed by the Arya Brahmins. The issues which the respondents were called upon to prove were, 1st, the alleged right of the Parishai Bhatters to perform Purohitam to all castes, that the Arya Brahmins had no title thereto, and had come to Ramaswaram since a particular date; 2nd, that they had originally paid an annual tax of 100 pons to the zemindar, and subsequently, with his consent, paid the 100 pons annually to the Gurukals for their maintenance.

The suit was first heard by the Judge of the subordinate Court of Madura, who, on the 19th of February 1855, made a decree in favor of the appellants. From this there was an appeal to the Civil Court of Madura, and the Judge of that Court on the 1st of August 1857, reversed the decree below, and dismissed the suit on the ground that the appellants had failed to prove the exclusive right which they claimed; but directed each party to pay their own costs. A special appeal was then preferred to the Sudder Dewanny Adawlut of Madras. The Court, on the 13th of December 1858, dismissed the appellants' suit with costs, on the ground that their claim was barred by the Regulation of Limitation, the only question which it allowed to be argued before it.

The present appeal is general. It had been very fully and ably argued before this Committee, both upon the merits of the case, and also upon the question whether the suit is effectually barred, either by the decrees in the former suit of 1835, or by lapse of time under the Regulation of Limitation.

Their Lordships propose, in the first instance, to deal with the merits of the case.

The first observation that arises is that the existence or non-existence of the original and exclusive right to administer Purohitam to all classes of pilgrims, which is claimed by the Arya Brahmins, is an issue which goes to the whole case. It is true that that part of the claim which consists of the arrears of the annual payment of 100 pons, under the instrument of 1762, is founded upon contract. But the contract is one between the Parishai Brahmins and the Gurukals, and it is difficult to see how the appellants, suing on behalf of the community of Arya Brahmins, can establish any title to relief in respect of this part of the case, unless they prove that the title of the

Gurukals to these six castes was derived, as alleged in the plaint, from the earlier and original title of the Aryas, and was so held by the Gurukals that the subsequent disposition of the castes must be taken to have been made for the benefit of the Arya community, as well as for that of the Gurukals.

What, then, are the proofs adduced in support of this first and principal issue?

The earliest in date consists of extracts from one of the Puranas. These, like the statements in the pleadings of the appellants' case, carry us far beyond the bounds of legal or historical evidence. But it is argued, and fairly and properly argued that these ancient books may legitimately be used as evidence that a certain state of facts, or a certain state of opinion, existed at the date of their compilation. That date is sufficiently uncertain; for we are not told when this particular Purana is supposed to have been written; and it appears from the writings of eminent Orientalists, that the period during which the eighteen recognized Puranas were composed is a very wide one, extending probably from the eighth to the sixteenth century.

Evidence of the appellants' right, dating even from the latest of these epochs, would of course be most valuable. Their Lordships, however, fail to find in the extracts before them satisfactory proof that at the time when this Purana was compiled (whenever that may have been), the Arya Brahmins were in the enjoyment of the peculiar and exclusive privilege which is now claimed by their descendants.

There are passages which show that a community known as Arya Brahmins then existed at Ramaswaram, and embody the legends concerning the miraculous origin of their ancestors, and their migration, at the summons of Rama, to the southern coast, from their native seat in Oudh. Other passages undoubtedly recommend in strong terms the ministrations of the Arya Brahmins, and imply that the full spiritual benefits of a pilgrimage are not to be obtained without them. But these do not lead with any certainty to the conclusion that even at that distant period all the pilgrims to Ramaswaram in fact resorted to the Aryas or Purohitam, or were under a positive and well-recognised obligation to do so. The very mode in which the peculiar efficacy of the ministrations of the Aryas is pressed leads to the inference that even then there was some variety of practice and opinion in this matter. Part of the Purana cited at page 102 of the Appendix is in the shape of a dialogue, wherein one of the interlocutors begins by expressing his doubts whether *puja* should be offered through the instrumentality of the Aryas, doubts which are of course ultimately removed. Taking the authority of these texts at the highest,—and it must be remembered that there is little of no evidence as to their authority,—their Lordships cannot find that they do more than enjoin upon pilgrims who wish to have the fullest spiritual benefit of their pilgrimage, the duty and necessity of resorting to the Aryas for their offices. They do not show that the duty was universally recognized as imperative, or that the enjoyment of the privilege, as it then existed, was exclusive.

Again, the value of the texts, such as it is, as evidence in support of the appellants' title, is in their Lordships' opinion much diminished by the consideration that the privilege now claimed is admitted to be capable of alienation or delegation. They would be of far more weight if the case made were that by positive ordinance or by traditionary usage the privilege of administering certain religious rites had become vested in a particular class of priests, so that in the contemplation of all faithful Hindoos the efficacy of the rite must for all time depend on the status or character of the ministrant. When the principal of alienation or delegation is admitted, texts to the effect that the efficacy of the rite depends on the character of the ministering priest necessarily lose their force.

Moreover, this quality of the privilege must greatly increase the difficulty of proving its continued enjoyment, supposing that it ever existed. Functions inseparably annexed by the authority of sacred books to a particular order of men will be recognized, preserved, and perpetuated by the religious sentiment of succeeding generations. But the privilege of exercising these functions, when alienable for money, ceases to be the subject of religious sentiment, and becomes a mere proprietary right; and every long-continued enjoyment of the privilege by others is of course capable of being ascribed to a presumed grant or alienation of which the direct evidence is lost.

That the present claim of the appellants, is not supported by any general religious feeling or conviction on the part of the Hindoos, whether founded on the texts of the Puranas or independent of them, may be inferred from the very nature of the disputes which have continued for so many years. It is clear that during that long pe-

riod there has been great diversity of practice and opinion amongst those who resort to the Pagoda; that out of the vast concourse of pilgrims from all parts of the Dekhan, if not of India, some have sought for Purohitam at the hands of the Aryas, others at the hands of the Parishai Bhatters, others, again, at the hands of the Adhyena Bhatters; probably as they have been moved by considerations of race, language, district, or caste. But we have more particular evidence upon this point in the Sreemokum of Sunkar Acharyar which was produced in evidence in the suit of 1835, and is referred to in the pleadings of this suit. That document was in the nature of a certificate from a person described as the High Priest of all the Hindoos of the South of India, and was strongly adverse to the claim of the Aryas. Mr. Elliot, who, as Judge of First Instance, decided the suit of 1835, felt it to be of sufficient weight to relieve him from the necessity of pursuing the enquiries which he had directed through pundits touching the authority of the texts from the Puranas. The appellants themselves, in their pleadings, seem to admit the general authority of Sunkar Acharyar, but endeavour to take off the effect of his certificate by telling a not very credible story of his having given it when in a fit of irritation against the Aryas. They have also produced, by way of answer to it, the Exhibits No. 28 and 30, at pp. 26 and 27 of the Appendix. It is sufficient, on this part of the case, to observe that the effect of these conflicting documents is at most to leave the question in doubt, and that the appellants cannot adduce, in support of this claim, anything like a clear concurrence of opinion upon the part of those who may be supposed to be at the present time authoritative expounders of the ceremonial and law usages of the Hindoo religion.

We now proceed to consider the effect of the other documentary evidence.

The documents which purport to be the earliest in date, except the Puranas, are the Deed D, No. 40, said to have been executed to the Aryas in A. D. 1675, by the Adhyena Bhatters; the copper-plate Deed produced by the respondents dated 1714; the Deed E., No. 41, said to have been executed by some on behalf of all the Parishai Bhatters to the Gurukals in 1726; and the subsequent Agreement F, No. 43, between the various parties, which purports to have been executed in 1762.

The first of these can at most prove that the Adhyena Bhatters, who are not parties to this suit, claim under a deed, purporting to be of considerable antiquity, the right of administering Purohitam to seven classes of pilgrims, other than the classes which are the subject of this litigation, under a title derived from the Aryas. The Adhyena Bhatters are said to have been since dispossessed of four of these seven classes by the Parishai Bhatters. But whatever may be the merits of that dispute they are not in question in this suit This deed can prove nothing here except that in 1675 the Aryas claimed the right of disposing of the privilege as to these particular classes of pilgrims, and that the Adhyena Bhatters then admitted their title.

The effect of the Deeds E and F (if any) upon the issue which we are now considering, *viz.*, the original and exclusive right of the Arya Brahmins to administer Purohitam, is limited to the six classes of pilgrims, which are the subject of these instruments. They do not touch the eleven other classes that are in question in this suit.

Their genuineness is questioned by the respondents, who give an account of the origin of the payment of 100 pons that is inconsistent with them. It has been argued that suspicion is cast upon them by the circumstance that no mention is made of them in the proceedings in the suit between the Gurukals and the Aryas in 1807, although the Parishai Bhatters are there stated to possess the privilege of administering Purohitam to these six classes, and to be subject to the duty of paying 100 pons annually to the Gurukals, and that nothing was heard of them until the suit of 1862. It has been further argued that there is no proof of the custody whence they came, or other evidence to support them. Notwithstanding these arguments, their Lordships are disposed to deal with the case as if both these deeds, as well as the copper-plate Deed of 1714, were genuine, they think the two former may well stand with the latter.

The copper-plate deed is upon the face of it nothing but the grant of certain subjects in favor of the goddess named in the heading of it, "on account of the Friday services." The annual payment of the Parishai Bhatter on this account appears on the whole evidence to be limited to 90 pons. This instrument, therefore, proves nothing as to the annual payment of 100 pons to the Gurukals, or its origin. It undoubtedly proves that in A. D. 1714 the body which the respondents represent was

known as "Parishai Bhatters," a title which implies some connection with pilgrims, and that as such, they carried on a business which may reasonably be inferred to have been the administration of Purohitam to some classes of pilgrims. And even if it be assumed that those classes of pilgrims included the six which are specified in the deeds E and F, that hypothesis is not necessarily inconsistent with these deeds, for the earlier deed E does not purport to be the original grant of these classes, or to show how the administration of Purohitam to them by the Parishai Bhatters began. It recites the existence of a dispute between the Parishai Bhatters and the Gurukals touching the administration of Purohitam (a dispute which may have been of long standing), an appeal to the zemindar, a reference to arbitration, and an award which, whilst it left the administration of the rite to the six classes with the Parishai Bhatters, imposed upon them the duty of paying 20 per cent on their receipts to the Gurukals. The two deeds, E and F, therefore, are not inconsistent with the copper-plate deed which the respondents may be taken to have proved, though they are inconsistent with their allegations touching the origin of the payments of 100 pons, which they have failed to prove. From the three documents taken together it follows that before 1726, and possibly before 1714, the Parishai Bhatters were in the exercise of the functions involved in the administration of Purohitam to some classes of pilgrims, including, or at least extending to, the six classes of pilgrims, which were the subject of the agreement of 1726; but the material question with reference to the issue now under consideration is, to what extent that arrangement with the Gurukals, and the description of the Gurukals in the two deeds as "forming the Arya Mahajanum," or "a part of the Arya Mahajanum," or "composed of Arya Mahajanum," involve any admission or proof of the general title set up by the appellants.

The answer to this question will be best supplied by a correct definition of the relation in which the Gurukals stood to the Arya Brahmins. Their Lordships must reject the statement upon this point which is contained in the fourth paragraph of the appeal petition at page 124 of the Appendix, as inconsistent with others made by the appellants in certain stages of the proceedings and with the evidence in the cause. It was, in fact, almost given up by Mr. Rolt in his reply, and treated as a mere argument of the appellant's pleaders in answer to an objection taken by the Judge in the Court below.

The most credible account of this Gurukal community is probably to be found in the proceedings in the suit of 1807 (the piece of evidence that is next in order of date) since it was given by the Gurukals themselves when engaged in litigation with the Arya Brahmins, and was then admitted by their opponents to be substantially correct. From that it would appear that the Gurukals were Maharatta Brahmins invested with the office of performing the *puja*, or worship, in the interior of the temples; that they were appointed by the Aryas, and were in the habit of marrying the daughters of Aryas; that the office of Gurukals was not hereditary, but that on the death of any one of them another Maharatta Brahmin was appointed in his place; that in 1807 the community of Gurukals were in the receipt of the 100 pons per annum from the Parishai Bhatters, and of fees payable in respect of other classes of pilgrims, by whomsoever the rite of Purohitam was administered; that the net emoluments of this community were divided amongst the members of it, and each man's share again apportioned between him and the particular Arya whose daughter he might have married. The two communities were therefore distinct bodies, differing in race; and this very suit of 1807 shows that they might have different and conflicting interests. If this be so, the description of the Gurukals as "composing," or "composed of," or "forming part of the Arya Mahajanum," must be inaccurate, unless these words imply a body in which the communities, though distinct for some, may coalesce for other purposes. Such an hypothesis is not inconsistent with the literal meaning of the words as it may be gathered rom "Wilson's Dictionary."

Again, in this suit of 1807, the Gurukals seem to have claimed the right of administering Purohitam to the six and certain other classes of pilgrims as a prescriptive right, without admitting any earlier title in the Aryas. The Aryas, in their answer, seem to set up a joint interest in the emoluments, and speak of a compromise and arrangement effected by deed, bearing a date which would correspond with A. D. 1745, of which there is no proof. Therefore the case made on either side in the suit of 1807 seems to be hardly consistent with that made in the present suit as to the deri-

vation of the Gurukals' title from that of the Aryas. And upon this part of the case, it appears to their Lordships that it would be unsafe to infer from the deeds E and F, or from any evidence that has yet been considered, either that the Aryas have a common interest with the Gurukal in the annual payment of 100 pons, or that such title as the Gurukals may have had in the six classes of pilgrims before the arrangement of 1726, was necessarily derived from the original and exclusive title to all classes of pilgrims which is set up by the Aryas. This view of the case is in some degree confirmed by what is called the "Attachi" at page 60 of the Appendix. That paper purports to be a representation made in March 1822, when the Pagoda was under the management of the Government Officers, by some of the appellants, to the effect that the Parishai Bhatters have allowed the payment of 90 pons and 100 pons to fall into arrear. It treats the whole money as payable to the Pagoda, and therefore, in the existing circumstances, to the Circar or Government, but describes the 100 pons as the masadanum for the Sabhayar or community of Gurukals.

The rest of the documentary evidence may be reduced to three heads: the proceedings in the Moonsiff's Court in 1826; the proceedings which resulted in the Collector's Order of 1835; and the proceedings in the suit of 1835.

The first suit was brought by some Parishai Bhatters against some Aryas, and it is said to have been collusive. The plaintiffs in it asserted the title of their body to administer Purohitam to twenty-four classes of pilgrims, admitting the duty of paying annually 190 pons to the Pagoda and the community of Gurukals. But the immediate subject of the suit was the alleged invasion of this right as to a class called "Sangita," which is one of those that were afterwards awarded by the Collector to the Aryas. There is no question about that class in this suit. Other Arya Brahmins intervened by petition, and set up their general title in the Moonsiff's Court. The Moonsiff made a decree against a defendant who had admitted (it is said collusively) the plaintiff's claim, and dismissed the suit as against the other defendants. He also intimated an opinion that the suit, if properly framed, would have been brought against the Arya Mahajanum, which appeared to have been in the enjoyment of the Purohitam of the Sangita class. This judgment has been treated as a decision in favor of the Arya Brahmins, but it cannot be taken for more than an expression of opinion that they might have a good title as to the class of which they appear to be in possession.

The chief importance of the proceedings which ended in the Collectors's order consists in the admission supposed to have been made before Mr. Paris, a subordinate Collector, in the course of a local enquiry made by him in 1829. It is contained in the Exhibit No. 79, at page 62 of the Appendix. It is referred to, though it is not very accurately described by the Collector in Exhibit No. 80, and is the basis of his order. It was produced in the suit of 1835, and was proved to the satisfaction of Mr. Elliot, the Judge. He says of it in his judgment: "The seristadar, it appears, wrote down in the presence of the Sub-Collector of Madura, from the months of the plaintiffs, that they had no dispute respecting seventeen of the twenty-five castes, but only for the remaining eight." Mr. Roit argued strongly upon the improbability of the Aryas making such an admission so soon after the decision in the Moonsiff's Court. It does not, however, cover this Sangita caste, which alone was the subject of the suit before the Moonsiff. And the improbability, such as it is, seems to their Lordships to be out-weighed by the consideration that two Officers with local experience have, whilst the facts were still recent, treated the document as genuine, and acted upon it. It is, therefore, difficult to suppose that the admission was not made by some at least of the Arya community, and it covers fifteen out of the seventeen classes that are the subject of this suit.

The decision of the Collector was almost immediately followed by the suit of 1835. The original plaintiffs in this were four only of the Arya Brahmins. Two of them having died twenty more members of the community intervened by petition, and seems to have adopted and prosecuted the suit. Its object was limited to the enforcement of the alleged rights of the Arya Brahmins as to two only of the classes which are the subject of this suit; but the original title of the community was stated in terms as wide as those in which it is now stated, and was distinctly put in issue. It was, moreover, supported by much the same evidence as that which has been adduced in this suit. The decision, however, of the Zillah Judge confirmed on appeal by the Provincial Court, was that the title was not made out, and the suit was accordingly dismissed.

Their Lordships may dismiss the oral testimony with the observation that it is almost necessarily inconclusive. The question is one on which the Hindoo community has for many years been divided. Each witness, as a matter of course, deposes according to the practice, opinions, or traditions of his own family. Nor will proof of acts done even by so considerable a personage as Holkar do more than prove the practice or opinion of a particular family or individual.

Upon the whole, it is their Lordships, opinion that the evidence, though it may establish that the Arya community has existed as part, and a principal part, of the Hierarchy of this Pagoda and its dependencies from a period of remote antiquity, and that the appellants may be taken to be the actual representatives of that community, fails to show, either by documentary proof of its origin, or by such proof of long and uninterrupted usage as in the absence of a documentary title will suffice to establish a prescriptive right, the existence at any time of the original and exclusive privilege which the appellants have made the foundation of their title. It also fails to show when and how, if the right ever existed, its enjoyment was first interrupted, and consequently, leaves it uncertain, whether the interruption was caused by an invasion for which there is now a remedy; or by an actual or presumable act of alienation. It is not proved that the appellant's community was at any particular time in the actual enjoyment of the privilege of administering Purohitam to eleven out of the seventeen classes which are the subject of this suit; whilst there is evidence that the Parishai Bhatters for some time anterior to 1835 were in the undisputed enjoyment of this privilege as to nine of these classes, and exercised it, though subject to dispute, as to the remaining two. Nor is it inconsistent with the evidence in the cause to suppose that this state of things may have existed in or before the year 1714. And if the evidence as to the remaining six classes shows that the Parishai Bhatters' undisputed enjoyment of the privilege as to these six classes for nearly 150 years has been subject to the payment of the 100 pons, under an arrangement which implies an acknowledgment of an earlier title in the Gurukals, it fails, as their Lordships have already observed, to establish either that the Aryas have a common interest with the Gurukals in this annual payment, or that the title of the Gurukals to these classes was necessarily derived from the still earlier and more general title of the Aryas which the appellants, assert.

The appellants, therefore, on all points, have failed to relieve themselves of that burthen which the necessities of their case, and the particular issues directed in the cause, imposed upon them. Nor is this failure the less fatal to this suit, because the respondents may also have failed to show that they had any exclusive right in the privilege which they enjoy; or because they may be under a liability to the Gurukals in respect of the annual payment of 100 pons, which may be capable of being enforced in a suit properly framed for that purpose.

Their Lordships, taking this view of the merits of the case, are relieved from the necessity of considering whether either the decrees in the former suit of 1835, or the Regulation of Limitation, present an effectual bar to this suit. They rest their decision on the ground that the appellants have failed to support their claim by any sufficient evidence.

Their Lordships, however, are of opinion that the Sudder Court ought not to have limited the argument to the single question of limitation; and that it ought not to have thrown on the appellants the whole costs of the suit. They think that the decree of 29th June 1857, sealed and signed on 1st August in that year, was correct in the direction given by it as to the costs up to the latter date; and they will, therefore, humbly advise Her Majesty that the decree of the Sudder Court ought to be varied, and to stand and be simply for the dismissal with costs of the appeal to that Court; the appellants, however, paying the costs of this appeal.

The 1st July 1864.

Present:

Lord Kingsdown, Sir E. Ryan, Sir J. T. Coleridge, Sir L. Peel, and Sir J. W. Colvile.

Evidence—Maps drawn for one purpose not admissible in suit for another purpose.

On Appeal from the Sudder Dewanny Adawlut at Calcutta.

John Kerr,

versus

Nuzzur Mahomed and Azeem Serang.

The rights of property as between two parties cannot be affected by a map drawn for a totally different purpose, and a purpose totally irrelevant to the subject of the dispute between them.

THE question in this case relates to a certain quantity of land between 3,000 and 4,000 beegahs, which are claimed on the one hand by the appellant, Mr. Kerr, and on the other hand by the respondent, Azeem Serang.

The right to these lands depends entirely upon the boundaries of two lots of land in the Sunderbunds, which were granted, in the year 1829 or 1830, by the Government of Calcutta. The lots are conterminous. One was granted to a gentleman of the name of Douglas, and now belongs to the respondents. The other belongs to Mr. Kerr. These two lots are each bounded on the east by a stream called the Poina Khal, on the west by a stream called the Tumboolda Khal, and the line where they join (being the southern boundary of the one, and the northern boundary of the other) is described in one of the pottahs as "a line drawn due east and west from the confluence of the Aryhee Baukee Khal," and in the other, "as a line drawn from the Tumboolda to the Poina, where a small khal issues."

Now these two descriptions taken together ascertain beyond all doubt or question what is the true boundary of these lands. Each description says, that it is to be a line from east to west from the Tumboolda Khal to the Poina Khal; and one of these descriptions specifies the point from which the line is to be taken as the confluence of the Aryhee Baukee Khal.

There is no question in this case as to the point where the Aryhee Baukee Khal is; and all the different maps that have been drawn correspond in that particular, and in drawing a line from the Aryhee Baukee Khal to the opposite stream of the Poina Khal. The question is, in what way that is to be drawn? The appellant insists that the line is to be drawn not due east and west, but to the north-east, making a difference of several thousand beegahs of land in favor of the one or to the prejudice of the other lot.

We have the pottahs before us under which both parties claim, which state that the line is to be drawn due east and west.

Two maps, one by Captain Hodges, and the other by Captain Prinsep, are in evidence; the boundaries are marked upon them, and they entirely correspond with the description in the two pottahs, as a line drawn due east and west from the one point to the other. The quantities of each lot are stated in the maps, one as 8,900 begahs and the other as 8,300 beegahs, and the boundaries so described and so marked upon these maps entirely correspond with the quantities thus ascertained.

It is a matter of surprise that it should be possible under such circumstances that any difficulty could arise, or that the Government could have been induced to grant a pottah to the present appellant, claiming under a grant of 8,300 beegahs, of no less than 13,000 odd beegahs: those 13,000 beegahs including between 3,000 and 4,000 beegahs belonging to the respondents, and the remainder being made up from lands belonging to other persons not represented in this suit.

When we come to look into the case, we find how this has happened. It turns out that in 1840 a dispute arose, not in the least with respect to the boundaries of Douglas' plot, not in the least with respect to the boundaries of Kerr's plot, but with respect to the division of a plot of land lying to the south of Kerr's, and still more to the south of Douglas,' which plot belonged to certain co-parceners or tenants in common, of whom Mr. Kerr was one.

There was a dispute as to the partition of these lands; and upon that occasion a Mr. Turner, a Government Surveyor, was called in for the purpose of settling that dispute, not for the purpose of settling anything as to the lots of Douglas' or Kerr's land, but to settle as between these differing co-tenants what were the proper limits of their respective properties. A map was drawn out by Mr. Turner upon that occasion, and it seems that a large portion of land to the north, which included Mr. Kerr's plot, was described in that map.

Upon looking at that map closely, we do not see that it professes to describe the northern boundary of Kerr's land, but whether it intended to do so or not is utterly unimportant; it was not the subject of any question or dispute for the settlement of which Mr. Turner had been employed.

Some time after this, the respondents obtained a grant of Douglas' land which had been resumed by the Government in consequence of the neglect of Douglas to cultivate it, according to the terms of the pottah. Upon this occasion a survey was made by Mr. Mullins, who was then the Surveyor of the Government, for the purpose of ascertaining the particulars of the grant, and Mr. Mullins made his report to the effect that Douglas' grant, described as

No. 60 in Hodges' map, contained 8,900 beegahs of land. Some time after this, it seems that Mr. Kerr disputed the boundaries of Mr. Douglas' grant, and Mr. Mullins was called upon by the Government to draw a map determining the boundaries. Instead of doing that, he took Mr. Turner's map which had been prepared for a totally different purpose, and made a copy of it without any examination whatever into the subject on his own part.

In 1851 a new grant was proposed by the Government for the purpose of converting these grants, which had been originally made in 1829 or 1830, into tenures of a somewhat different description. Upon that occasion it became necessary to ascertain what quantity of land had been brought into cultivation in Mr. Kerr's lot, and upon what extent therefore the rent was to be calculated; and Mr. Mullins was called upon by the Government to make the necessary survey and return. Mr. Mullins, it seems, was a son-in-law of Mr. Kerr, and he sent in to the Government a copy of the plan which he had prepared before in 1851, by which he actually made out that under this grant of 8,300 beegahs of land, Mr. Kerr was entitled to 13,640 beegahs, Mr. Kerr not even pretending to have the least additional title to any quantity of land beyond that which he held under his original pottah. A more scandalous abuse of the authority placed in the hands of this Surveyor was probably never witnessed This very man who had certified 8,900 beegahs as being the amount of Douglas' plot, now made another report, by which he reduced that plot to 5,000 odd beegahs; the 8,300, which had been granted to Kerr, his father-in-law, being increased to 13,600 beegahs. It is satisfactory to find that this gentleman did not continue long in this office which he so abused; for it appears that in 1852 he was removed by the Government, the Government at the same time expressing its regret that he had not been removed two years sooner.

There is, therefore, really nothing in this case upon which any question can arise. We have the original grants, with the clear and precise descriptions, corresponding with the boundaries and the quantities, and we have the maps to which those documents refer. The whole difficulty in this case has resulted from that improper proceeding on the part of Mr. Mullins to which we have referred.

What is there said on the other side? There is really nothing. It is said that the respondent Azeem Serang was a servant of Mr. Kerr at the time when that map of Mr. Turner's was drawn. Of what possible importance can that be? He assisted Mr. Turner under the directions of his master. Probably he knew nothing about the boundary. It had nothing to do with the boundary of Douglas' property. It could not in the least affect the rights of the property as between those individuals. That map was drawn for a totally different purpose, and a purpose totally irrelevant to the subject of this dispute.

The only other point which is relied upon is, what is called the receipt and supposed acquiescence on the part of the respondents in the boundaries subsequently proposed or settled by Mr. Gomes, another surveyor, and which in truth is neither more nor less than an adoption of this most erroneous and improper map which had been prepared by Mr. Mullins. It does not appear from that document that at the time when it was made the respondents knew in the least what those boundaries were which had been thus settled. It is quite clear that they could not have done so. It was giving up the whole point for which, against extraordinary difficulties and with remarkable perseverance, and at great expense probably, they had been struggling for six years. It may be observed that Gomes had at first proposed to draw up a map and report according to the actual state of the titles and the truth of the case; but he was prevented from doing so by the interfereuce of the appellant, who procured an order from the Government that in settling the boundaries he should not disturb the plot granted to Mr. Kerr.

Their Lordships are of the opinion stated in the report of Mr. Commissioner Stainforth, who was appointed by the Government after the institution of the suit, to look into the matter and correct what had been done so irregularly and improperly: After going through all the facts of the case he says. "Under these circumstances it is abundantly clear to me that Mr. Turner's map is an incorrect if not collusive document, and that Mr. Kerr, in claiming a boundary running north-east from the Tumboolda, instead of due east and west, is encroaching on his neighbours' lands."

Their Lordships cannot look at what has taken place in this case without feelings of great regret, and of something more than regret. It is a case in which they can do but very inadequate justice by recommending, as they will do, that the appeal should be dismissed with costs.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

The 30th November 1863.

Present:

Lord Justice Knight Bruce, Sir E. Ryan, Lord Justice Turner, Sir L. Peel, and *Sir J. W. Colvile.*

Rule of Succession to a Principality—Judgment in rem and Judgment inter partes (Distinction between)—Hindoo widow (Decree against, binding on Heirs)—Joint Hindoo Family—Onus probandi (Allegation of partition)—Inheritance by widow of separate estate.

On Appeal from the Sudder Dewanny Adawlut at Madras.

Kattama Nauchear,

versus

The Rajah of Shivagungah.

The succession to a zemindary which is admitted to be in the nature of a Principality—impartible and capable of enjoyment by only one member of the family at a time—is governed (in the absence of a special custom of descent) by the general Hindoo Law prevalent in the part of India in which the zemindary is situated, with such qualifications only as flow from the impartible character of the subject.

The succession to such a zemindary may be governed by a particular or customary canon of descent.

A judgment is not a judgment *in rem*, because, in a suit by A for the recovery of an estate from B, it has determined generally concerning the *status* of a particular person or family; it is a judgment *inter partes*.

The same principle which has prevailed in England as to tenants in tail representing the inheritance, would seem to apply to the case of a Hindoo widow; and it is obvious that there would be the greatest possible inconvenience in holding that the succeeding heirs were not bound by a decree fairly and properly obtained against the widow.

A decree in a suit brought for a zemindary by a Hindoo widow, binds those claiming the zemindary in succession to her. Unless the decree can be successfully impeached on some special ground, it will be an effectual bar to any new suit by any person claiming in succession to her. For assuming her to be entitled to the zemindary at all, the whole estate would, for the time, be vested in her, absolutely for some purposes, though, in some respects, for a qualified interest; and, until her death, it could not be ascertained who would be entitled to succeed.

A person, admitting that brothers have been joint in estate, and alleging a partition at a particular place and time, must take upon himself the burden of proving that partition.

Notwithstanding the fact that the grantee selected by Government after the escheat of the zemindary was a remote kinsman of the zemindar of the former line, it was held to be the necessary conclusion from the terms of the grant and the circumstances in which it was made that the zemindary was the self-acquired property of the grantee.

The course of succession, according to Hindoo Law of the South of India, of a zemindary so acquired, where the family was in other respects an undivided family, was held to be that, the husband dying without male issue, his widow inherited.

In the case of property, of which part is the common property of a joint Hindoo family, and part the separate acquisition of a deceased brother, his widow (in default of male issue) succeeds to his separate estate.

There being a community of interest and unity of possession between all the members of a united family having common property, it follows that, upon the death of any one of them, the others may well take by survivorship that in which they had, during the deceased's lifetime, a common interest and common possession.

But the law of partition shows that, as to the separately acquired property of one member of a united family, the other members of that family have neither community of interest nor unity of possession. The foundation, therefore, of a right to take such property by survivorship fails; and there are no grounds for postponing the widow's right to inherit it in any superior right of the co-parceners in the undivided property.

THE subject of this appeal, and of the long litigation which has preceded it, is the zemindary of Shivagungah in the District of Madura and Presidency of Madras.

This zemindary is said to have been created in the year 1730 by the then Nabob of the Carnatic, in favor of one Shasavarna, on the extinction of whose lineal descendants in 1801 it was treated as an escheat by the East India Company, which had then become possessed of the sovereign rights of the Nabobs of the Carnatic and was granted by the Madras Government to a person whom we shall distinguish by one of his many names as Gaurivullabha. He had an elder brother named Oya Taver, who predeceased him, dying in 1815. The zemindar himself died on the 19th of July 1829.

He had had seven wives, of whom three only survived him. Of the deceased wives, the first had a daughter (since dead), who left a son named Vadooga Taver; the second had a daughter named Bootaka; the third had two daughters, Kota and Kauttama, the present appellant; and the fourth was childless. The three surviving widows were Unga Muttoo Nauchear, Purvata Nauchear, and Mootoo Veray Nauchear. Of these Purvata was *enceinte* at the time of her husband's death, and afterwards gave birth

to a daughter named Sowmia. The two others were childless.

Oya Taver the brother left three sons, of whom the eldest was named Muttoo Vadooga.

The zemindary is admitted to be in the nature of a Principality,—impartible, and capable of enjoyment by only one member of the family at a time. But whatever suggestions of a special custom of descent may heretofore have been made (and there are traces of such in the proceedings), the rule of succession to it is now admitted to be that of the general Hindoo Law prevalent in that part of India, with such qualifications only as flow from the impartible character of the subject.

Hence, if the zemindar, at the time of his death, and his nephews were members of an undivided Hindoo family, and the zemindary though impartible, was part of the common family property, one of the nephews was entitled to succeed to it on the death of his uncle. If, on the other hand, the zemindar, at the time of his death, was separate in estate from his brother's family, the zemindary ought to have passed to one of his widows, and failing his widows, to a daughter, or descendant of a daughter, preferably to nephews; following the course of succession which the law prescribes for separate estate. These propositions are incontestible; but Gaurivullabha's widows and daughters have advanced a third, which is one of the principal matters in question in this appeal. It is that, even if the late zemindar continued to be generally undivided in estate with his brother's family, this zemindary was his self-acquired and separate property, and, as such, was descendible, like separate estate, to his widows and daughters and their issue preferably to his nephews, though the latter, as co-parceners, would be entitled to his share in the undivided property. Upon this view of the law, the question whether the family were undivided or divided becomes immaterial. The material question of fact would be whether the zemindary was to be treated as self-acquired separate property, or as part of the common family stock.

Whichever may have been the proper rule of succession, it is certain that, if not on the death of Gaurivullabha, at least on the failure of his male issue, being demonstrated by the birth of his posthumous daughter, his nephew Muttoo Vadooga Taver obtained possession of the zemindary. He seems to have set up an instrument which in the proceedings, is called a will. On the appellant's side this is treated as a forgery. The respondent denying the forgery, does not now treat the document as a testamentary disposition, or as material to his title; and it may, therefore, be dismissed from consideration. Muttoo Vadooga obtained possession with the concurrence of the various members of the family, and of Government and its officers as is shown by the documents at pp. 62 and 63 of the Appendix. He afterwards obtained from the then three surviving widows the razeenamah or agreement set out at p. 64 of the Appendix. He continued in possession without litigation, if not without dispute, until his death, which took place on the 21st of July 1831; and was then succeeded by his eldest son, Bodhaguru Sawmy Taver.

Soon after this event, began the litigation concerning this property, which has now continued upwards of thirty years. Its history may be conveniently divided into three periods: the *first* beginning with the institution of suit No. 4 of 1832, and ending with the order of the Queen in Council in 1844; the *second* beginning from the date of that order, and ending with the death of the widow, Unga Muttoo, on the 23rd of June 1850; and the *third* being that which covers the proceedings which have been had since Unga Muttoo died.

The suit No. 4 of 1832 was brought by Velli Nauchear, the daughter of Gaurivullabha by his first wife, on behalf of her infant son Muttoo Vadooga. It claimed the zemindary for the infant by virtue of an Arzi said to have been sent to the Collector by Gaurivullabha in 1822, according to which the succession would be to the son of a daughter in preference to his widows, and *a fortiori* in preference to his brother's descendants. The defence to this suit insisted that the zemindary had been granted to Gaurivullabha solely in the consequence of his relationship to the former zemindars, and was, therefore, to be treated as part of the undivided family estate, and, as such, descendible to the eldest of the male co-parceners in preference to any descendant in the female line from Gaurivullabha. The reply did not raise any distinct issue as to the character of the family, whether divided or undivided, but insisted that the zemindary was to be regarded as the self-acquired and separate property of Gaurivullabha, and ought to pass by virtue of the Arzi to the plaintiff.

In 1833, two other suits were instituted against the zemindar in possession. Of

these, that distinguished as No. 4 may be left out of consideration, inasmuch as the plaintiff in it rested his title on an alleged adoption by Gaurivullabha, of which he failed to give satisfactory proof. Such a title, if established, would, of course, have been paramount to the claims of either the nephews or the widows.

No. 3 of 1833 is, however, the most important, with reference to this appeal, of the three suits now under consideration. It was brought by Unga Muttoo, the fifth wife and the elder of the three widows of Gaurivullabha. She set up an adoption, or *quasi* adoption of Gaurivullabha, by the widow of the last zemindar of the elder line, and treated this as the consideration, or a principal consideration, for the grant of the zemindary made to him by the East India Company; and she insisted that Muttoo Vadooga Taver, on her husband's death, got possession of the zemindary, of which she was the legal heiress, by means of the forged will. The defence to this suit, so far as it related to the title of the zemindar in possession, was substantially the same as that made to the suit No. 4 of 1832; but it also denied the alleged forgery of the will, and insisted on the razeenamah executed by Unga Muttoo and the other widows to Muttoo Vadooga Taver. In her reply, Unga Muttoo did not raise any distinct issue as to the division or non-division of the family. She submitted, as an issue of fact, that the zemindary had been acquired by the sole exertions and merits of her husband; and as an issue of law, that what is acquired by a man, without employment of his partrimony, shall not be inherited by his brothers and co-heirs, but, if he dies without male issue, shall descend to his widows, his daughters, and parents, before going to his brothers or remter collaterals.

These three suits were all dismissed by the Provincial Court. We have not the decree or decrees of dismissal, but it seems probable that they were heard and disposed of together. It also appears that, although there was not in any of them a distinct issue, whether Gaurivullabha and his nephews were or were not an undivided Hindoo family, some evidence was given in the suit No. 4 of 1832 to show that he and his brother were separate in estate. There was an appeal in each of three suits, and these were heard together, and disposed of by the decree of the Sudder Court, which is set out at p. 270 of the Appendix. That decree dismissed No. 4. of 1833 on the ground that the plaintiff had failed to prove his alleged adoption by Gaurivullabha, and it dismissed No. 4 of 1832 on the ground that the succession to the zemindary was governed by the general Hindoo Law, and not by any particular or customary canon of descent; so that, if descendible as separate estate, it would go to the widows of Gaurivullabha in preference of a grandson by a daughter. In the suit No. 3 of 1832, it decided, *first*, that, as a matter of fact, the zemindary was the self-acquired and separate property of Gaurivullabha: *secondly*, that according to the opinion of the Pundits whom it had consulted, the rule of succession to the zemindary, though self-acquired, would depend on the fact whether the brothers had or had not divided their ancestral estate; that in the former case it would belong to the widow, and in the latter to the nephew: *thirdly*, that, upon the whole evidence, the brothers must be taken to have divided their ancestral property: and *lastly*, that the plaintiff Unga Muttoo was entitled to recover the zemindary, not having forfeited her rights by the execution of the razeenamah.

Against this decree, the zemindar, then in possession, appealed to Her Majesty in Council. The order made on that appeal on the 19th of June 1844, was that the decree of the Sudder Court should be reversed, with liberty to the respondent, Unga Muttoo, to bring a fresh suit, notwithstanding the decree of the Provincial Court, at any time within three years from the filing of that order in the Sudder Dewanny Adawlut. The grounds on which their Lordships who recommended this order proceeded were, as appears from the judgment delivered by Dr. Lushington, that the Sudder Court had miscarried in deciding the question of division which was not one of the points reserved in the cause, nor was expressly raised upon the pleadings, but that the respondent ought to be allowed to remedy the omission in a new suit. And their Lordships added that, though they could make no order on the subject, it would be exceedingly desirable that it should be known to all those who were interested in the property that the question of division or non-division appeared to be the only point on which the main question of title to the property would ultimately depend.

On the 20th of August 1845, Unga Muttoo commenced her second suit in *formâ pauperis*. In the interim, Bodhagura Taver had died, and the zemindary had passed

to his brother Gaurivullabha, the father of the respondent, and he with a younger brother were the defendants to the new suit. In her plaint, the widow, after stating the pedigree of the family, some of the former proceedings, and the desire of Velu Nachyar, the widow of the last zemindar of the elder line, to make Gaurivullabha, the first of that name whom we have mentioned, her successor, proceeds to allege that with that object she has caused him and his elder brother Oya Taver to make a partition of their ancestral property as early as the year 1792. The plaintiff then excuses her omission to plead this fact in the previous suit by saying that she had been advised; it was only necessary for her to show that her husband had been adapted by Velu Nachyar, and that the zemindary was his self-acquisition. She then proceeds to allege that, on the death of Velu Nachyar, he actually became zemindar until he was dispossessed by the usurpers; on whose defeat and destruction by the East India Company he was again put in to the possession under their grant. She also, in this suit, makes the alternative case that, even if no partition of their ancestral property took place between Gaurivullabha and his brother Oya, she, as the eldest widow, was entitled to the zemindary, as a separate acquisition, in preference to that brother's descendants, and pleads the decision in what is called the Sandayar case, to prove that such is the Hindoo Law, and that the opinion given in the former case by the Pundits to the contrary was erroneous.

In his answer, the first and principal defendant recapitulated the several facts relied upon by Bodhaguru in the former suit as constituting his title. He insisted that, by the decision of the Privy Council the contest was narrowed to the issue whether the brothers was undivided in estate or not, and that the plaintiff should have rested her claim on that issue. He contended that there had been no partition. The points recorded in the suit (Appendix p. 24) are thus somewhat vaguely stated:—

"The plaintiff to prove, by means of documents and witnesses, that division took place in 1792. As the defence is but a denial of this circumstance, the defendant cannot be called upon to establish the negative side by direct proof. But the defendant will have to prove the points mentioned in paragraphs 2 to 5 of the answer; and he is required to use, if possible, strong arguments against the points particularly spoken of by the plaintiff."

A large body of evidence is, in fact, given by each side on the question of division or non-division. The case was heard by the Zillah Judge, Mr. Baynes, whose decree, dated the 27th of December 1847, is at page 143 of the Appendix. The effect of it was that the only question really open between the parties was that of division or non-division; that the plaintiff had failed to prove the partition between Gauriyullabha and his brother Oya; and that her suit must be dismissed with costs.

Against this decree, and on the 6th of April 1848, Unga Muttoo appealed to the Sudder Court. The defendant Gaurivullabha then died, and his infant son, the present respondent, came in, and on the 5th of November 1849, filed an answer to the appeal. Before the appeal was heard, and on the 24th of June 1850, Unga Muttoo also died, and with her death ended the second stage of this long litigation.

On the death of Unga Muttoo, the Court seems to have issued a notice in the form ordinarily used on the abatement of an appeal by the death of the appellant, calling upon the heirs of the deceased to come forward and prosecute the suit. This form of notice, it is obvious, was not strictly applicable to a case like the present, where, upon the death of a Hindoo widow, the right of action formerly vested in her devolves not upon *her* heirs, but upon the next heirs of her husband; and to this circumstance may be traced some of the confusion which is observable in the subsequent proceedings. Such as it was, however, the notice brought into the field three sets of claimants. The first consisted of Boothaka Nauchear, the daughter of Gaurivullabha by his second wife, and Kota and the present appellant, his daughters by his third wife. The claim as the rightful heirs of the zemindary, if it passed as separate property, next in succession to the widow Unga Muttoo; but considering its impartible nature, they expressed their willingness that it should be enjoyed first by Boothaka for her wife, next by Kota for her and lastly by the appellant. They treated Sowmia, the daughter by the sixth wife, as excluded from the succession by reason of her marriage with Bodhaguru, and of her being then a childless widow.

Sowmia, however, came forward by a separate petition, claiming to be heiress both to Unga Muttoo and the zemindary, by virtue of an instrument alleged to have been executed by Unga Muttoo in her life-time.

A third claimant was Mutto Vadooga, the plaintiff in the dismissed suit of 1832. His contention was that, though the decree in that suit may have been right in preferring to his claim that of Unga Muttoo, his title as grandson was nevertheless preferable to that of daughters, and that, on the death of the widow, he became entitled to the zemindary.

Counter-petitions were filed on behalf of the respondent, objecting to the revival of the appeal by any of these claimants; and it is observable that he then insisted they ought to be compelled to bring fresh suits for the trial of their alleged rights, in order to give him the means of alleging and proving certain special matters of defence against them, of which he would not have the benefit in the suit of Unga Muttoo.

The Sudder Court, in dealing with these claims to prosecute the appeal, has made three different and inconsistent orders:—

By the first, dated 21st October 1850, (Appendix 1, p. 290), it held that none of the claimants could prosecute the appeal, which it directed to be removed from the file, but left any of them at liberty to bring a new action to enforce their respective claims, provided it was commenced before the 30th of April 1851.

They all petitioned for a review of this order; counter-petitions were filed on behalf of the respondent; and the Court, by its order of the 1st of May 1851, notwithstanding an adverse opinion given by the Pundits on the 7th of March preceding, reversed its former order, and directed the appeal to be replaced on the file, and the several claimants to be made supplemental appellants; resolving to hear the appeal, and, if it should be sustained, to determine the mode in which their rights as against each other and the defendant should be tried.

On the 19th of April 1852, the Court, apparently of its own mere motion, on taking up the record of the appeal, reversed this order of the 1st of May 1851, and ruled that the several claimants could not be heard on the appeal, but might prosecute their respective rights in the Court of first instance, which Court was to be guided in the admission and hearing of their claims by the Regulations in force, and the appeal was again removed from the file.

Thereupon the respondent shifted his ground, and by a petition dated the 30th of June 1852, objected to the last order and prayed for a review of it. His contention then was that the heirs, next in succession to Unga Muttoo, according to that course of succession, might have been admitted to carry on the appeal, and that it was a hardship on him to have to litigate his title with them in a new suit. The Court, however, by its proceeding of the 16th of September 1852, adhered to its order, giving at the same time a not very intelligible explanation of it.

Of the three daughters of Gaurivullabha who joined in the first of the above-mentioned applications to the Sudder Court, the appellant alone brought a fresh suit. The plaint was not filed until the 5th of December 1856; but there seem to have been various intermediate proceedings before both the Zillah and Sudder Courts. These are referred to in the appellant's petition of appeal at page 260 of the Appendix, line 51, but are nowhere stated in detail. Her plaint stated that her father and his brother Oya Taver were divided in estate prior to 1801, and were then living separately; that the zemindary was granted exclusively to the former, and was, therefore, his self-acquisition, and enjoyed by him in exclusion of his brother.

The appellant's title in succession to Unga Muttoo is thus stated:—"The zemindary, which is the self-acquisition of the "plaintiff's father after his division with "Oya Taver, belongs, on the death of his "widow, Unga Muttoo, to his second "daughter the plaintiff, who has male and "female issue: whilst his first daughter "Bootaka has no issue, and the third "daughter Sowmia is a widow." In the seventh paragraph (Appendix, p. 251), (though the point is not taken so distinctly as in the suit of Unga Muttoo) she claims the zemindary as her father's self-acquisition irrespectively of the alleged partition with his brother, and question of division.

The answer took a formal objection to the suit, *viz.*, that it was brought against the guardian of the infant zemindar, and not, as it ought to have been, against the infant jointly with his guardian. It also insisted on the Regulation of Limitation and the decree of the 17th of December 1847, as bars to the appellant's claim. It further impeached her title as the heir next in succession to Unga Muttoo in that line of succession, alleging that there were descendants of Gaurivullabha through his elder widows, and it again pleaded many of the facts put in issue in the suit of 1845 as constituting the title of the infant zemindar. The estate being then in the custody of the Court of

Wards, the Collector was made a defendant, and put in a similar answer. Replies and rejoinders were filed; but without settling any issues or taking any evidence in the cause, the Zillah Judge (Mr. Cotton) on the 25th of August 1859, dismissed the suit, together with the suit No. 4 of 1857, which had been instituted by Sowmia, but with which we have no concern. His reasons for dismissing the appellant's suit were:—*first*, that upon the question of division, she was concluded by the decree of 1847, which he treated as a judgment *in rem*, made final by the removal of the appeal from the file; and, *secondly*, that it was clear upon the opinions of the Pundits, that the zemindary, whether self-acquired or not, could not descend to the widow, nor *a fortiori* to a daughter, except in the event of the zemindar having been of a divided family.

The appellant appealed from this decision to the Sudder Court, praying that the suit might be remanded for adjudication on the merits. Her appeal was dismissed by a decree dated the 5th of November 1859. The Sudder Court seems also to have considered that, by the dropping of the appeal on Unga Muttoo's death, the decree of 1847 had become final, and, as such, was an effectual bar to the appellant's claim. On the third of March 1860, the Sudder Court refused to give the appellant leave to appeal to Her Majesty in Council; but special leave was afterwards given on the recommendation of the Committee.

The present appeal is against the decree of the Sudder Court of the 5th of November 1859; and its order of the 3rd of March 1860, and the decree of the 25th of August 1859. It is also against the order of the Sudder Court of 1852, and the decree of the Civil Court of Madura of the 27th of December 1847. If, therefore, the latter decree is, in truth, a bar to the appellant's obtaining effectual relief in her original suit, the appeal seeks, by re-opening that decree, to remove the bar.

And here, before going farther, their Lordships deem it right to remark shortly upon the extraordinary doctrine touching this decree which was propounded by the Zillah Judge when dismissing the suit of 1856; because, if unnoticed here, as it seems to have been unnoticed by the Sudder Court, it may find acceptance with other unprofessional Judges, and embarrass the course of justice in India. Their Lordships would otherwise think it unnecessary to observe that a judgment is not a judgment *in rem*, because, in a suit by A for the recovery of an estate from B, it has determined an issue raised concerning the *status* of a particular person or family. It is clear that this particular judgment was nothing but a judgment *inter partes;* and the only question which could properly arise concerning it in the suit of 1856 was to what extent, as such, is was binding on the appellant.

Their Lordships also feel constrained to observed that the various proceedings which have taken place since Unga Muttoo's death have signally failed to do justice between the parties, or to dispose of the matters in dispute between them by any thing approaching to a regular course of trial and adjudication. When Unga Muttoo died, the decree of 1847 was not a final decree. An appeal was pending against it. Either it was binding upon those who, in the event of her title being a good one, would succeed to the zemindary, or it was not. Those persons were obviously not her heir's but the next heirs of her husband according to the canon of Hindoo Law, which defines the succession to separate estate. It ought not their Lordships conceive, to have been a difficult matter to ascertain the persons answering to this description. If the decree were in its nature binding on them, they, when ascertained, ought to have been allowed to prosecute the appeal. If the decree were not binding upon them, it ought not to have been treated as an obstacle to the full trial and adjudication of their rights in an original suit. The Sudder Court, however, after making two other and inconsistent orders, referred the parties to an original suit; and yet a suit of that nature, when brought by the appellant, has been since disposed of against her summarily, and without taking evidence, on the ground that the main and essential issue in it was concluded by the decree of 1847. Therefore she has fallen, so to speak, between two stools. She has had neither the benefit of the appeal against the decree of 1847, nor a fair trial of her right in a new suit.

It has been ingeniously argued here that for this result the appellant is herself solely responsible; that the suit which she ought to have brought, and which the Sudder Court intended her to bring, was in the nature of a bill of revivor, or a bill of revivor and supplement, limited to the object of obtaining from the Zillah Court a declaration that she had established her title to stand in the place of Unga Mootoo, and

carry on the former suit. Whether the procedure of the Courts of the East India Company admitted of such a suit (and no precedent of one has been produced) their Lordships are not prepared to say. But they have a very strong and clear opinion that such was not the nature of the suit which the Sudder Court had in its contemplation when it made its order of 1852. The omission to reserve the hearing of this appeal until the determination of the new suit; its removal from the file, which seems to be tantamount to its dismissal for want of prosecution, and has been so treated in these proceedings; the contention of the respondent himself in his counter-petitions filed in opposition to the first applications for leave to prosecute the appeal,—all point to the conclusion that the new and original suit intended was one in which the whole title of the claimants should be again pleaded and litigated.

The subsequent and obscure order of the 16th of September 1852 (Appendix, p. 248) is hardly inconsistent with this, though it seems to contemplate that the decree of 1847 might prove an effectual bar to the suit, which the Court itself had directed. Yet, if there was ground for this apprehension, in what a position had the Sudder Court placed the claimants? It had denied to them the power of prosecuting the appeal; it had thereby made final that which was not in its nature final; and having thus tied their hands, it sent them to wage a contest in a new suit in which, so bound, they could not but fail. If, therefore, the decree of 1847, when final, was binding on the claimants, the Sudder Court ought either to have dealt with the appeal on the merits, or it ought to have declared the claimants at liberty to bring and prosecute the new suit, notwithstanding that decree.

In either view of the case, therefore, there was a grave miscarriage of justice in the earliest order of the Sudder Court which is appealed against, viz., that of the 19th April 1852.

It seems, however, to be necessary, in order to determine the mode in which this appeal ought to be disposed of, to consider the question whether the decree of 1847, if it had become final in Unga Mootoo's life-time, would have bound those claiming the zemindary in succession to her, and their Lordships are of opinion that, unless it could be shown that there had not been a fair trial of the right in that suit—or, in other words, unless that decree could have been successfully impeached on some special ground—it would have been an effectual bar to any new suit in the Zillah Court by any person claiming in succession to Unga Mootoo. For, assuming her to be entitled to the zemindary at all, the whole estate would, for the time, be vested in her, absolutely for some purposes, though, in some respects, for a qualified interest; and, until her death, it could not be ascertained who would be entitled to succeed. The same principle which has prevailed in the Courts of this country as two tenants in tail representing the inheritance, would seem to apply to the case of a Hindoo widow; and it is obvious that there would be the greatest possible inconvenience in holding that the succeeding heirs were not bound by a decree fairly and properly obtained against the widow.

But, then, assuming that the succeeding heirs would be so bound, it was strongly insisted on the part of the respondent that this Committee can do no more than remand the cause, with directions to the Sudder Court to hear and determine the appeal against the decree of 1847; that it cannot itself deal with the merits of a decree of a Zillah Court, until they have been determined by the Appellate Court. Their Lordships, however, are not of that opinion. The appeal was ripe for hearing by the Sudder Court. Their Lordships have before them all the materials for a decision upon the merits, which have been fully argued before them. They conceive, therefore, that they are not bound to yield to this technical objection. On the contrary, they think that it is competent to them to advise Her Majesty to make the order which the Sudder Court ought to have made in 1852, and that it is their duty to do so.

The substantial contest between the appellant and the respondent is, as it was between Unga Mootoo and the respondent's predecessors, whether the zemindary ought to have descended in the male and collateral line; and the determination of this issue depends on the answers to be given to one or more of the following questions:—

1. Where Gaurivullabha and his brother undivided in estate, or had a partition taken place between them?

2. If they were undivided, was the zemindary the self-acquired and separate property of Gaurivullabha? And if so—

3. What is the course of succession according to the Hindoo Law of the south of India of such an acquisition, where the

family is in other respects an undivided family.

Upon the first question their Lordships are not prepared to disturb the finding of Mr. Baynes in the decree of 1847. There are undoubtedly strong reasons for concluding that Gaurivullabha and his brother, after the acquisition by the former of the zemindary, lived very much as if they were separate. But this circumstance is not necessarily inconsistent with the theory of non-division, if, as was likely, the family and undivided property was very inconsiderable in comparison of the separately-enjoyed zemindary. And Unga Mootoo, having admitted that the brothers had been joint in estate, and alleged a partition at a particular place and time, took upon herself the burthen of proving that partition; a burthen from which, it must be admitted, she has not satisfactorily relieved herself. Nor can their Lordships, in considering this question, be unmindful of the presumption which arises from the lateness of the period at which the allegation of division was first made: and from the silence of the parties in the suits of 1832 and 1833, as well as in the suit of 1823, which is mentioned in these proceedings, upon the subject of a partition which, if it had ever taken place, must have been in the knowledge of all the members of the family.

The second question their Lordships have no hesitation in answering in the affirmative. Every Court that has dealt with the question has treated the zemindary as the self-acquired property of Gaurivullabha. Their Lordships conceive that this is the necessary conclusion from the terms of the grant, and the circumstances in which it was made. The mere fact that the grantee selected by Government was a remote kinsman of the zemindars of the former line does not, their Lordships apprehend, bring this case within the rule cited from Strange's "Hindoo Law" by Sir Hugh Cairns.

The third question is one of nicety and of some difficulty. The conclusion which the Courts in India have arrived at upon it, is founded upon the opinion of the Pundits and upon authorities referred to by them. We shall presently examine those opinions and authorities; but, before doing so, it will be well to consider more fully the law of inheritance as it prevails at Madras and throughout the southern parts of India, and the principles on which it rests and by which it is governed. The law which governs question of inheritance in these parts of India is to be found in the Mitacshárá, and in Chapter 2, Section 1 of that work the right of widows to inherit in default of female issue is fully considered and discussed.

The Mitacshárá purports to be a commentary upon the earlier institutes of Yaynawulkya; and the Section in question begins by citing a text from that work, which affrms in general terms the right of the widow to inherit on the failure of male issue. But then the author of the Mitacshárá refers to various authorities which are apparently in conflict with the doctrines of Yaynawulkya, and, after reviewing those authorities, seeks to reconcile them by coming to the conclusion "that a wedded wife, being chaste, takes the whole estate of a man, who, being separated from his co-heirs, and not subsequently re-united with them, dies leaving no male issue." This text, it is true, taken by itself, does not carry the rights of widows to inherit beyond the cases in which their husbands have died in a state of separation from their co-heirs, and leaving no male issue; but it is to be observed that the text is propounded as a qualification of the larger and more general proposition in favor of widows; and consequently, that, in construing it, we have to consider what are the limits of the qualification, rather than what are the limits of the right. Now, the very terms of the text refer to cases in which the whole estate of the deceased has been his separate property, and, indeed, the whole Chapter in which the text is contained, seems to deal only with cases in which the property in question has been either wholly the common property of a united family, or wholly the separate property of the deceased husband. We find no trace in it of a case like that before us, in which the property in question may have been in part the common property of a united family, and in part the separate acquisition of the deceased; and it cannot, we think, be assumed that, because widows take the whole estates of their husbands when they have been separated from, and not subsequently re-united with their co-heirs, and have died leaving no male issue, they cannot, when their husbands have not been so separated, take any part of their estates, although it may have been their husband's separate acquisition. The text, therefore, does not seem to us to govern this case.

There being then no positive text governing the case before us, we must look to the principles of the law to guide

us in determining it. It is to be observed, in the first place, that the general course of descent of separate property according to the Hindoo Law is not disputed. It is admitted that, according to that Law, such property descends to widows in default of male issue. It is upon the respondent, therefore, to make out that the property here in question, which was separately acquired, does not descend according to the general course of the law. The way in which this is attempted to be done, is by showing a general state of co-parcenaryship as to the family property; but assuming this to have been proved, or to be presumable from there being no disproof of the normal state of co-parcenaryship, this proof, or absence of proof, cannot alter the case, unless it be also the law that there cannot be property belonging to a member of a united Hindoo family, which descends in a course different from that of the descent of a share of the property held in union; but such a proposition is new, unsupported by authority, and at variance with principle. That two courses of descent may obtain on a part division of joint property, is apparent from a passage in Macnaghten's "Hindoo Law," title "Partition," vol. I, page 53, where it is said as follows: "According to the more correct opinion, where there is an undivided residue, it is not subject to the ordinary rules of partition of joint property. In other words, if, at a general partition, any part of the property was left joint, the widow of a deceased brother will not participate, notwithstanding the separation, but such undivided residue will go exclusively to the brother."

Again, it is not pretended that on the death of the acquirer of separate property, the separately acquired property falls into the common stock, and passes like ancestral property. On the contrary, it is admitted that, if the acquirer leaves male issue, it will descend, as separate property, to that issue down to the third generation. Although therefore, where there is male issue, the family property and the separate property would not descend to different persons, they would descend in a different way, and with different consequence; the sons taking their father's share in the ancestral property subject to all the rights of the co-parceners in that property, and his self-acquired property free from those rights. The course of succession would not be the same for the family and the separate estate; and it is clear, therefore, that according to the Hindoo Law, there need not be unity of heirship.

But to look more closely into the Hindoo Law. When property belonging in common to a united Hindoo family has been divided, the divided shares go in the general course of descent of separate property. Why, it may well be asked, should not the same rule apply to property which, from its first acquisition, has always been separate? We have seen from the passage already quoted from Macnaghten's "Hindoo Law," that, where a residue is left undivided upon partition, what is divided goes as separate property; what is undivided follows the family property; that which remains as it was, devolves in the old line; that which is changed and becomes separate, devolves in the new line. In other words, the law of succession follows the nature of the property and of the interest in it.

Again, there are two principles on which the rule of succession according to the Hindoo law appears to depend: the first is that which determines the right to offer the funeral oblation, and the degree in which the person making the offering is supposed to minister to the spiritual benefit of the deceased; the other is an assumed right of survivorship. Most of the authorities rest the uncontested right of widows to inherit the estates of their husbands, dying separated from their kindred, on the first of these principles (1 Strange, 135). But some ancient authorities also invoke the other principle. Vrihaspati (3 Dig. 458, tit. cccxcix; see also Sir William Jones' paper cited 2 Strange, 250) says: "Of him whose wife is not deceased, half the body survives; how should another take the property, while half the body of theo wner lives?" Now, if the first of these principles were the only one involved, it would not be easy to see why the widow's right of inheritance should not extend to her husband's share in an undivided estate. For it is upon this principle that she is preferred to his divided brothers in the succession to a separate estate. But it is perfectly intelligible that, upon the principle of survivorship, the right of the co-parceners in an undivided estate should override the widow's right of succession whether based upon the spiritual doctrine or upon the doctrine of survivorship. It is, therefore, on the principal of survivorship that the qualification of the widow's right established by the Mitacshárá, whatever be its extent, must be taken to depend. If this be so, we can hardly in a doubtful case, and in the absence of positive authority, extent the rule beyond the reasons for it. According to the principles,

of Hindoo Law, there is co-parcenaryship between the different members of a united family, and survivorship following upon it. There is community of interest and unity of possession between all the members of the family; and upon the death of any one of them, the others may well take by survivorship that in which they had, during the deceased's life-time, a common interest and a common possession. But the law of partition shows that, as to the separately acquired property of one member of a united family, the other members of that family have neither community of interest nor unity of possession. The foundation, therefore, of a right to take such property by survivorship fails; and there are no grounds for postponing the widow's right to inherit it to any superior right of the co-parceners in the undivided property.

Again, the theory which would restrict the perference of the co-parceners over the widows to partible property is not only, as is shown above, founded upon an intelligible principle, but reconciles the law of inheritance with the law of partition. These laws, as is observed by Sir Thomas Strange, are so intimately connected that they may almost be said to be blended together; and it is surely not consistent with this position that co-parceners should take separate property by descent, when they take no interest in it upon partition. We may further observe that the view which we have thus indicated of the Hindoo Law is not only, as we have shown, most consistent with its principles, but is also most consistent with convenience.

A case may be put of a Hindoo being a member of a united family having common property, and being himself possessed also of separate property. He may be desirous to provide for his widow and daughters by means of the separate property, and yet wish to keep the family estate undivided. But if the rule contended for were to prevail, he could not effect his first objection without insisting on the partition, which, *ex hypothesi*, he is anxious to avoid.

The case standing thus upon principle, we proceed to consider the opinions of the Pundits and the authorities referred to by them.

The case appears to have been referred to the Pundits on several occasions. The first of these references was made by the Zillah Court in 1833, in the suit No. 4 of 1832. The answer of the Pundits bears date the 28th of October in that year, and is at pages 311 and 312 of the Appendix. It is unnecessary, however, to examine this particularly, since whatever is there laid down is included in the fuller statements which will be next considered.

These fuller statements were made by the same Pundits in answer to references directed by the Sudder Court before making the decree of the 17th of April 1837. The answers are dated the 28th of December 1836, and the 16th of January 1837, and are at pages 141 and 272 of the Appendix.

On examining the reasons on which the Pundits rest their opinions, it is to be observed that they proceed upon the assumption that the texts cited by them apply to the case which they were called upon to consider. They seem to have done so, both as to the passages cited from Vrihaspati and as to the text in the Mitacshárá to which they refer; but they leave untouched the question which they ought to have considered whether these authorities do or do not affect this particular case. What we have already said as to the text from the Mitacshárá and what we shall presently say as to the passages from Vrihaspati, is, we think, a sufficient answer to this part of the reasons on which the Pundits found their opinion. Then, again, they point to the distinction between obstructed and non-obstructed heritage; and because the widow's right is not mentioned as obstructing the heritage, they infer that she cannot be entitled.

But the whole of this last agreement seems to be founded on the passages in the Mitacshárá contained in Clauses 2 and 3 of Section 1, Chapter I; and these passages, when examined clearly, appear to be mere definitions of "obstructed" and "non-obstructed heritage," and to have no bearing upon the relative rights of those who take in default of male issue. If, indeed, the argument which the Pundits have raised upon these passages be well founded, it would, as it seems, prevent the widow from taking in any case.

It remains, then, to consider the authorities on which the Pundits rely in support of their opinions. They consist of the text from the Mitacshárá to which we have already so frequently referred, and passages from Vrihaspati and several other commentators on the Hindoo Law. We have already intimated our opinion that the text from the Mitaschárá does not apply to this case, and as to the passages from the commentators they are all of equivocal import. They may or may not have been intended to apply to a case like the present; and if there was nothing more to be found upon the subject, they might or might not be thought sufficient

to warrant the opinion which the Pundits have founded upon them. But these passages seem to be the same passages, or passages similar to those, which were brought forward before the time of the Mitacshárá, to show that widows were not entitled even where the property was wholly separate. We may instance the passage from Nareda. These authorities failed when contrasted with conflicting passages in the works of other commentators, of which the Pundits in this case have taken no notice, to negative the right of the widow where the property was wholly separate; and as they have failed to this extent, we cannot but think that the Pundits in this case have gone much too far in bringing them forward as uncontradicted authorities in favor of the opinion which they have formed, that the widows are not in this case entitled to the separately acquired property. It seems to us, too, that the decision in the Sandayar case—a decision also founded on the opinion of the Pundits of the Sudder Court—is wholly at variance with the opinion of the Pundits in the present case. Whether the Pundits in that case were or were not right in the opinion that the zemindary became the separate property of the uncle by the transaction between him and his nephew, is quite unnecessary to consider. All that is important to be considered is, that holding the zemindary to have become the separate property of the uncle, they held that the widows of the uncle's son became entitled to it, and that the Court followed that opinion. The Pundits, in the present case, attempt to reconcile the conclusions at which they have arrived with the opinion given by the Pundits in the Sandayar case, by assuming that the Pundits in that case proceeded upon an idea that the descendants of the common ancestor had been separated; but we see no foundation whatever for that assumption. On the contrary, the facts of the case seem to us to negative it. If, indeed, there had been any such separation, we do not see how there could have been any question as to the rights of the widows.

The case, therefore, stands thus upon the authorities. On the one hand, we have the opinions of the Pundits in this case, which seem never to have been acted upon by any *final* decree. On the other hand, we have the decision in the Sandayar case, and the other authorities cited for the appellants at the bar, particularly the passage from Menu, in Sir William Jones' paper, given at 2 Strange, page 250, and the opinion of the Pundit Kistnamachary (2 Strange, p. 231), the latter and material portion of which is not open to the objection taken to the passage which precedes it by Messrs. Colebrooke and Dorin.

In this state of things their Lordship cannot but come to the conclusion that the balance of authority, as well as the weight of principle, is in favor of the appellant's contention.

We proceed, then to consider how the Sudder Court ought to have dealt with this case after Unga Mootoo's death; and we are of opinion that that Court ought, upon the applications made by the different parties claiming to prosecute the appeal, to have determined which of the parties was so entitled. We are of opinion that Sowmia and the grandson were not so entitled, and that their claims, therefore, ought at once to have been dismissed. The claims of the appellant and her two sisters were founded on a right common to them as against the respondent; and we think that the Court ought to have held them entitled to prosecute the appeal without prejudice to their rights *inter se*, founded upon the agreement which appears to have been entered into between them. It would then have been open to the Court to decide the case upon the merits; and upon the merits we are of opinion, for the reasons above given, that the appellant and her sisters were well entitled to the zemindary as against the respondent. We have, of course, not failed to consider the judgment of this Committee in 1844. Nor have we failed to observe that, in a recent edition of his Treatise on the Hindoo Law of Inheritance, Mr. Strange, one of the Judges of the Sudder Court of Madras, has expressed an opinion adverse to the conclusion at which we have arrived. But we think it probable that the case was not so fully discussed and examined in 1844 as it has been on the present hearing; and, at all events, we do not feel ourselves justified in holding the appellant bound by the opinion which was then expressed; which, though, of course, entitled to the greatest possible respect, was not necessary to the decision then arrived at. And as to the opinion expressed by Mr. Strange, it seems to rest upon the opinions of the Pundits, and the proceedings of the Courts, which we have not been called upon to review. If that opinion had been supported by a uniform course of decisions, we should perhaps have felt some difficulty in contravening it; but as the case stands upon the authorities, we feel bound to give effect

to the conclusion at which we have arrived.

We shall, therefore, humbly recommend Her Majesty to reverse the decrees and orders complained of by this appeal; to declare that the suit of 1856, which appears to us to have resulted from erroneous directions given by the Sudder Court, ought to have been and ought to be dismissed; and in the suit of 1856 to declare that Sowmia and Mutto Vadooga were not, nor was either of them, but that the appellant and her sisters were, as against the respondent, entitled to prosecute the appeal, and to recover the zemindary—this declartion to be without prejudice to the rights of the appellant and her sisters *inter se*; and, further, to declare that an account ought to have been, and ought to be directed of the rents and profits of the zemindary received by the respondents, or by his order, or for his use, since the death of Unga Mootoo, with directions for payment to the parties entitled of what should be found due upon the account; and also to declare that the zemindary ought, at once, to be put into the hands of the Collector, or of a receiver to be appointed by the Court, with liberty to the appellant and her sisters, or any of them, to apply to the Court as they may be advised. We shall further recommend that the case be remitted to the Sudder Court, with directions to carry these declarations into effect; but we shall not recommend that any costs be given of the suit of 1856, or of this appeal, or of any of the proceedings below. But any costs to which the appellant has been subjected must be refunded.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

The 18th July 1860.

Present:

Lord Kingsdown, the Judge of the High Court of Admiralty, Sir E. Ryan, Sir L. Peel, Sir J. W. Colvile.

Agreement by third party to pay for another—Bona fide endeavour of the obligor to perform his engagement—Disposition of Obligee to prevent performance—Interest.

On Appeal from the Sudder Dewanny Adawlut at Calcutta.

Ram Gopal Mookerjee,

versus

Masseyk and Kenny.

Where a third person voluntarily consents to incur liability on account of another, and binds himself in a penalty for the due performance of his engagement, the nice technicalities of English Law are not applicable, but the real intention of the parties must be looked to. In this case, there having been a *bonâ fide* endeavour on the part of the respondent fairly to perform his engagement, and there having been a disposition on the part of the appellant to throw obstacles in the way of the performance in order to obtain payment of the penalty consequent on non-performance, the appeal was dismissed.

It appeared that there was an interval of several months during which time no interest was calculated. The Privy Council, although inclined to believe that the interest was due, yet finding that the point was not stated in the reasons of appeal laid before the Sudder Court, and that it did not appear to have been suggested below, disallowed it. The sum would probably have been allowed if it had been asked; and if it had been refused, the amount would have been far below that for which an appeal to the Privy Council could be brought.

This is a suit brought by the appellant to recover 12,829 rupees alleged to be due to him from the respondents under an ekrarnamah or agreement.

It appears that the appellant was the lessee of certain lands in the zillah of Jessore, and that the respondent Kenny, who was the proprietor of several Indigo Factories in that district, was under-lessee of a portion of the property.

The appellant alleged that a large sum was due to him from Kenny for rent, and he brought several actions in the zillah Court of Jessore to recover the amount, and issued attachments against Kenny's factories and other property.

In 1850, while this litigation was pending, the other respondent Masseyk intervened and alleged that he had become the purchaser of the interest of Kenny, and he objected to any sale being made under the attachments.

He obtained an order to stay the sale under four of the attachments, from which order the present appellant appealed to the Sudder Dewanny Adawlut, and that appeal was pending at the time when the engagement on which the question before us was raised, was entered into by Masseyk; besides which three other execution of decree cases were pending for trial in the zillah, and other actions were brought by Masseyk against the appellant.

In this state of things the instrument in question was executed by Masseyk on the 25th September 1850.

It is in the Bengalee form and language, and is addressed by Masseyk to the appellant. It recites the circumstances already stated, and that Masseyk was desirous of coming to an amicable settlement for the money due to the appellant; that the amount due to the appellant from Kenny had been proved to be 33,589 rupees 15 annas 3 pice, and of which under an amicable settlement Masseyk had agreed to pay to the appellant 25,000 rupees, and that the appellant had agreed to receive the said sum and make a remission.

The agreement then states that certain sums had already been received by the appellant in part of the 25,000 rupees; that, at the time of the execution of the instrument, 10,000 rupees more had been paid to the appellant through his mooktear, leaving 12,713 rupees; and that Masseyk agreed to pay this sum, with interest, from the 1st Bhadoon (16th August 1850) by two instalments, one of 6,000 rupees, for principal, on the 10th Magh (22nd January 1851), and the other of 6,719 rupees, for principal, on the 10th Choit (23rd March 1851). In what way the interest was to be paid, we will consider presently. The payments were to be endorsed on the back of the ekrar; then follow these words:—"And whatever sum of money I may at any time pay, you will first deduct the interest money out of that, and credit the balance for principal."

The factories are then pledged for the payment of this money, as well as the personal

liability of Masseyk. Then follow these words:—"If I fail to pay the whole of the money due to you, together with interest, after deduction of the remitted money, agreeably to the condition written, then the remission of the money that you have now made under the applicable settlement is not to hold good, and the said remitted money will be justly due by me, and you will realize it by the sale of the hypothecated Factories, and from me, my heirs, representatives, and executors, and in the event of any other person purchasing the said Factories from the said purchaser."

Provision is then made for putting an end to the several suits subsisting between the deferent parties.

It is to be observed that, although the debt from Kenny to the appellant might be 33,589 rupees 15 annas 3 pice, it by no means followed that the property which Masseyk had purchased was liable to the payment of the whole of that sum; and, whatever might be the liability of the property, Masseyk was, previously to this agreement, under no personal liability. By the agreement he made himself personally liable to the extent of 25,000 rupees for the debt of another; of which sum nearly half was actually paid at the time; and these payments made and to be made were part of an arrangement for a general settlement of the various disputes then pending between the parties, and for the dismissal of the suits.

There is nothing in the agreement which makes the payment of the instalments on the days fixed of the essence of the contract, unless that stipulation is to be inferred from the words, "If I fail to pay agreeably to the condition written."

Instead of there being in any other part of the agreement anything to favour this construction, the nature of the engagements on each side, and the clause to which we have referred as to any payments on account being applied first to payment of interest, appear to us to furnish an implication to the contrary.

It being a part of the agreement that the suits in the Zillah Court and the Sudder Dewanny should be abandoned, the vakeels of both parties, on the day of the date of the agreement, brought it under the notice of the Sudder Dewanny by petition. It was also, on the same day, brought to the notice of the Zillah Court.

The first instalment of 6,000 rupees became due on 22nd January 1851: it was not actually paid till the 21st of March 1851.

The second instalment became due on the 23rd March 1851, and was not received by the appellant until 5th July 1851. Under these circumstances, the appellant has brought his action against Masseyk and Kennyin, sisting that the agreement has not been performed according to its tenor, and that he is, therefore, entitled to receive the payment of the whole amount of 8,000 and odd rupees, which, he says, were only to be remitted on the condition of the less sums being paid punctually on the specific days mentioned in the agreement.

On the part of the respondent it is contended that payment on the day was no essential part of the contract; that this is not the case of a creditor engaging to remit to his debtor a portion of his demand in consideration of his making payment of smaller sums punctally at fixed periods, in which case the punctuality of payment is the only consideration which the creditor receives for his indulgence; that this case does not, therefore, fall within the principle of Ford and Lord Chesterfield relied on by the appellant, but is a case in which a third person being under no liability, consents to incur that liability, and binds himself in a penalty for the due performance of his engagement.

The Judges of the Zillah Court, and all the Judges of the Sudder Court, have decided against the claim of the plaintiff, the present appellant; and their Lordships have to consider whether any sufficient reasons have been urged for disturbing those decisions.

The Lordships are of opinion that they ought not to apply to this case the nice technicalities of English Law, that they must look at the agreement with a view to see what the real intention of the parties was, and must enquire whether it appears upon the evidence that there has been any failure by the respondents in the substantial performance of the contract; and if there has been any default to whom such default is attributable.

It appears to their Lordships to be sufficiently proved that on the 10th Magh the respondent Masseyk, through his mooktear, offered to pay to Deb Comar Rae, the mooktear of the appellant, in the Zillah of Jessore, the sum of 6,000 rupees as the first instalment due under the agreement, and that Deb Coomar Rae declined to receive it, alleging that he had not in his possession the ekrarnamah on which the receipt of the money was to be endorsed. This instrument

is said to have been in the possession of the appellant himself, who resided at some distance from Jessore.

It is objected, on the part of the appellant, to this offer—

1. That the offer did not include the interest which ought at that time to have been paid;

2. That Deb Coomar Rae had no authority to receive the money on behalf of the appellant;

3. That the respondent was bound to seek out the appellant on the day of payment, and to tender to him the exact amount of principal and interest then due.

Their Lordships, on consideration, are of opinion (contrary to the impression which they at first entertained) that, by the agreement, the interest on the 12,719 rupees, up to the day of payment, was to be paid at the same time with the 6,000 rupees, and that, therefore, if it were necessary to prove a strict legal tender, such tender was not made; but they are satisfied that the omission to include the interest arose merely from a misapprehension of the ambiguous words of the agreement, and that such omission was not the reason why the money was refused, and they think that a strict legal tender was not necessary.

2. They are by no means satisfied that Deb Coomar Rae had not authority to receive the money. He has not been examined by the appellant, and he was summoned as a witness by the respondent and he failed to appear. He was the person through whom, if the attachments against the property had been prosecuted, the money would have been recovered, and to whom it would have been paid in the Zillah Court; and he was, therefore, the person to whom the respondent might well imagine that the ekrarnamah, on which the payment of the money was to be endorsed, would be transmitted by the appellant. There seems no improbability in the statement of the respondent's witnesses that Deb Coomar Rae said that he would send for the ekrarnamah that the endorsement might be made upon it.

3. There seems to have been uncertainty on both sides as to the place at which the ekrarnamah was to be produced and the money was to be paid. The instrument was executed at Calcutta, where the appellant had a mooktear; it related to property at Jessore, where the appellant had another mooktear. The deed had been sent from Calcutta to be produced in the Zillah Court of Jessore. The appellant resided at Beernuggur, and had a place of business at Kishnuggur. It is stated by the respondent that it was verbally settled, after the execution of the ekrar, that the money should be paid to the appellant's mooktear in the Zillah of Jessore, and that appellant would send the ekrar to him. There is, however, no proof of this. On the other hand, the appellant does not allege that there was any place fixed, either by agreement or by custom, or by rule of law, where the payment should be made. He suggests, indeed, at different times in the course of the proceedings, that the payment or tender might have been made to his mooktear at Calcutta, or to himself at his house at Beernuggur, or to the house of the mal-zeminder of the ijarah. To these the place of business of the appellant at Kishnuggur was added in the discussion at our Bar as a proper place for making the tender.

Upon the whole their Lordships are satisfied that there was a *bonâ fide* endeavour on the part of the respondent fairly to perform his engagement, and that there is much reason to believe, with some of the Judges in the Court below, that there was desire on the part of the appellant to throw obstacles in the way of the performance, in order to obtain payment of the penalty which he expected would be the consequence of non-performance.

The principle of these observations applies to the second instalment as well as the first; and their Lordships have arrived without hesitation at the conclusion that the main ground of the appeal entirely fails, and that if the appellant has received the full amount of the principal sum of 12,719 rupees, with interest upon that sum till the time of payment, he has received everything which he can justly claim.

They are not, however, satisfied that he has received the full amount of interest which he might reasonably demand; because it appears that, with respect to the last instalment, there was an interval of several months, during which time no interest was calculated, the delay of payment during that period have arisen, as it is suggested, from the accidental absence of the European Judge from Jessore. It appears, however, that this point is not stated in the reasons of appeal laid before the Sudder Court, nor does it appear to have been suggested below. The sum would, probably, have been allowed if it had been asked, and if it had been refused, the amount would have been far below that for which an appeal to this country can be brought.

Under these circumstances, their Lordships think they would not be justified in modifying, on this ground, the order which they must humbly advise Her Majesty to make, *viz.*, an order that this appeal be dismissed with costs.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

The 12th July 1864.

Present:

Lord Kingsdown, Lord Justice Knight Bruce, Sir E. Ryan, and *Lord Justice Turner.*

Bond (by Executor and Guardian)—Kistbundee or engagement to pay by instalments (by Minors)—Adjustment of accounts.

On Appeal from the Sudder Dewanny Adawlut at Caclutta.

Gholab Khoonwurree Bebee,

versus

Eshur Chunday Chowdry and others.

The appellant made a claim upon the respondents in respect of certain bonds given during their minority by their executor and guardian. On attaining majority, the respondents being desirous of avoiding payment, were adviced that they could only do so by instituting a suit to which the executor must be a party, and in which a settlement of his accounts would be required. But as the executor was their spiritual guide and had been their father's also, instead of instituting a suit against him they thought it better to come to terms with the appellant in order to obtain time for the payment of the debt by instalments; and a Kistbundee was accordingly executed. HELD that the respondents could not now, after the death of the guardian, dispute their liability for the payment of the debt which they had thus deliberately undertaken to pay, notwithstanding that no adjustment of accounts had taken place to ascertain the balance really due to the appellant before the grant of the kistbundee.

WE have looked carefully through the papers in this case, and remain of the opinion which we intimated at the hearing, that the decree cannot be supported. Considering the large amount of the sum at stake and the position in life of the respondents, it is difficult to account for their omitting to appear at our bar to maintain the decree, which they have obtained. But, as far as we can discover, the proceedings of the appellant have been regular, and she is entitled, therefore, to call upon us to dispose of the appeal *ex-parte*.

The appellant carries on business as a Banker; in that character she alleges that she made very large payments for the respondents, during the time that they, or some of them, were minors, in respect of jumma or revenue due to the Government from a zemindary belonging to them. These advances are alleged to have been made at the instance of a person who was the guardian of the infants, and executor and trustee under the Will of their father. For these sums, the respondent on taking possession of their zemindary, had given a kistbundee or engagement to pay the amount by instalments; and for one of the instalments so secured, the action in this case was brought.

There appears to be great reason to suspect fraud on the part of the guardian, and some reason to believe that the agents of the appellant were privy to it. There can be little doubt that the lease of the respondents' zemindary which was made by the guardian to a servant of the appellant, and which was disputed by the respondents and surrendered by the lessee, was really made to the servant as the nominee and for the benefit of the appellant. It is very possible that, if the respondents had instituted a suit to take the accounts of this guardian, and, charging collusion between him and the appellant, had investigated the transactions which had taken place, it might have appeared that there was no such sum as was claimed by the appellant justly due to her.

The Judges of the Sudder, who have pronounced a decree in favor of the respondents, seem to have been influenced by reasons of this nature, and to have rested their judgment on the ground that no adjustment of accounts had taken place to ascertain the balance really due to the appellant before the kistbundee was granted.

But we think that this objection under the circumstances cannot be allowed to prevail; for the question whether it would be fit to insist on this adjustment was distinctly brought under the notice of the respondents before the kistbundee was executed, and decided by them in the negative. It is proved by Hurroo Gobind Sen that, when a claim was made upon the respondents in respect of the bonds given by the executor and guardian, they were desirous of avoiding the payment, and consulted him as to the mode of doing so; that they were advised by him that they could only do so by instituting a suit to which the executor must be a party and in which a settlement of his accounts.

would be required. Now, the executor was their spiritual guide and had been the spiritual guide of their father, and it was not considered proper to institute a suit against him. Under these circumstances it was thought better to come to terms with the appellant, to obtain time for payment of the debt by instalments. The kistbundee was accordingly executed, and the witness says that he considered the arrangement beneficial to the respondents.

There seems no reasons whatever to doubt this statement. Hurroo Gobind Sen, who makes it, was in the employment of the respondents, was connected with them by marriage, and was referred to in their answer as one of their agents who ought to have been employed in any business of this description.

It appears impossible to permit the respondents, after the death of the guardian, now to dispute their liability for payment of the debt which they had thus deliberately undertaken to pay.

The kistbundee itself and its registration appear to be regularly proved, payments have been made of some of the instalments, and such payments are endorsed upon the instrument. The account-books of the appellant were produced at the hearing, and the fact of the payments made by her as the consideration, for the bonds given by the executor seems to have been thereby established.

Whatever suspicion may attach to the dealings between the appellant and the executor, it cannot affect the decision of the present suit. We think that the decree of the Zillah Court must be restored, and the decree of the Sudder reversed, and that the appellant must have the costs of the proceedings in the Sudder Court, but we are not inclined to give any costs of this appeal.

We will make a report to her Majesty in conformity with the opinion which we have expressed.

The 23rd July 1864.

Present:

Lord Kingsdown, Sir E. Ryan, Sir J. T. Coleridge, Sir L. Peel, and *Sir J. W. Colvile.*

Conversion of Government Securities deposited in Court, otherwise than at the instance of the depositor.

On Appeal from the Sudder Dewanny Adawlut at Calcutta.

Rajah Sutteeshchunder Roy,

versus

Samasoondry Debia and others.

Where Government Securities bearing interest at 5 per cent were desposited in Court for payment of interest thereon to certain annuitants, and the Registrar of the Court, in pursuance of notices given by the Government Agent, converted the notes into 4 per cent papers,—HELD that, though the conversion of the notes was the act of Government and of the Court, not of the parties, the appellant was liable, under his agreement, to pay the annuitants the sum originally agreed upon.

THEIR Lordships have looked through the printed papers in this case, and also through the MS. documents handed in by the appellant for the purpose of showing how the Government Securities for 60,000 rupees deposited in Court, and at the time bearing 5 per cent interest had been converted into Government notes bearing only 4 per cent interest. That examination shows that the statement in some of the papers that the 60,000 rupees were originally invested in a single note is mistaken. It appears that they were invested in notes of different amounts; and with respect to the notes for 42,000 rupees, the subject of the present appeal, that they were paid off at different times in the years 1833 and 1837, in pursuance of notices given by the Government Agent to the Registrar of the Court of Sudder Adawlut, and were were converted into Government paper bearing only 4 per cent interest.

This had been done before the division of the notes amongst the parties entitled to the income; and though the delivery out of the notes to the claimants seems to have been irregular, it did not affect the conversion of the 5 per cent securities, into 4 per cent securities, which was the act not of the parties but of the Government and of the Court.

Now that conversion having reduced the 3,000 rupees which the annuitants were entitled to receive by one-fifth, the appellant under his engagement became liable to make it good; and in this suit he has been charged with the amount found due in that respect upon 42,000 rupees which seems to have been the only sum on which the Court considered that actual proof had been given of the conversion of the notes. This order does no injustice to the appellant. We cannot, therefore, advice Her Majesty to reverse the judgment complained of. We

think it should be affirmed, without prejudice to any proceedings which the appellant may take for the full sum of compelling the holders of the notes for the full sum of 60,000 rupees to bring them back into Court. The effect, however, of this may possibly be that the appellant may be found liable to a loss in respect of the conversion of the other notes beyond the 42,000 rupees.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

The 30th July 1860.

Present:

Judge of the High Court of Admiralty, Sir E. Ryan, Sir J. T. Coleridge, and Sir L. Peel.

Action—Tort.

On Appeal from the Supreme Court of Judicature at Fort William in Bengal.

Thomas Eales Rogers,

versus

Rajendro Dutt and others.

In the case of damage occasioned by wrongful act, (*i. e.*, an act which the law esteems an injury) the same remedy by action lies against the doer, whether the act was his own spontaneous and unauthorised or whether it was done by the order of Government. Malice is not a necessary ingredient to the maintenance of the action. It is essential to an action in fort that the act complained of should, under the circumstances, be legally wrongful as regards the party complaining; that is, it must prejudicially affect him in some legal right; merely that it will however directly, do him harm in his interests, is not enough.

The Government may prohibit its pilots from allowing any vessels under their pilotage charge to be taken in tow of a Steamer, the owners of which will only render their services on exorbitant terms.

THIS was an appeal from the Supreme Court of Calcutta. The respondents were the plaintiffs in that Court, and their plaint recited that they, before the committing of the grievances complained of, had been, and then were, the owners of a steam-tug called the *Underwriter*, employed for hire in towing ships to and from the port of Calcutta, and in the receipt of large profits from such employment; and that the defendant was an officer in the public Service of the East India Company, having the name and style of the Superintendent of Marine, and that, as such, he was invested with the chief authority and control over all the officers of the Bengal Pilot Service, employed by the Company on the Hooghly River for the purpose of piloting vessels thereon to and from the said port; and that the said officers of the Bengal Pilot Service were the only pilots who, upon the said river, exercise the calling of pilots, and take pilotage charge of inward and outward-bound ships; and that, in consequence of the perils of the navigations no ship can with safety proceed inwards and outwards, or be duly navigated, except in charge of a competent pilot. After these recitals, the plaint charged that the defendant wrongfully and unjustly contriving and intending to injure the plaintiffs, and to prevent them from continuing to employ their said steam-tug, wrongfully and injuriously issued and published a certain order, addressed to the said officers of the Bengal Pilot Service, whereby he, as such Superintendent of Marine, strictly prohibited them from allowing the said steam-tug to take any ship in tow of which they should have charge. It then stated the period during which the order remained in force; the deprivation of employment during that time; and the consequent loss of profit, laying the damage at 20,000 rupees. To this plaint the appellant pleaded three pleas: on the first only of which, being the plea of not guilty, the question before their Lordships arises. The allegations in the inducement by way of recitals must be taken to have been admitted by the defendant: and supposing the direct allegations which are in issue to have been proved in such sense as to make the action maintainable, no question was made before us as to the amount of the damages awarded. The point for consideration, therefore, is whether upon the evidence in the case this action is maintainable.

As their Lordships view the evidence, the facts appear to be the following:—The Bengal pilots are an organized body under the control of the Superintendent of Marine, which office, at the time in question, was filled by the defendant. They form by far the larger part of the Calcutta pilots, and on them devolves the almost indispensable duty of piloting vessels up and down the Hooghly to and from the sea and port of Calcutta. Tugs are constantly required for bringing vessels up: and the plaintiffs' were owners of one, a steam-tug, the *Underwriter*, employed in this service. For such service there are two rates of payment, one called the Government Certificate, in which the amount is regulated by a tariff according to the time employed; the other depending on the special contract between the parties. On the 20th September 1857 when the mutiny in India was in full vigour, Her Majesty's ship *Belleisle* entered the

Hooghly bringing troops for the Public Service. The Captain of the "*Underwriter*," Henry Fox, who was seeking employment, went on board and offered to take her up. At this time a Bengal pilot was in charge of her. Fox declined to take her on the terms of the Government Certificate, and asked a much larger sum, first 3,000 rupees, and finally 2,500. The Captain, not choosing to incur the responsibility of agreeing to this demand, telegraphed once and again to Mr. Beadon, the Secretary to the Government of India, stating, on the second occasion, the demand, that his pilot required a powerful tug, and asking what amount he might offer. On the receipt of this second application, Mr. Beadon communicated it to the defendant, with a letter stating what had passed, and concluding with these words,—"what had better be done?" The defendant immediately went to Mr. Beadon, and gave him his opinion that the charge was exorbitant: that it was Mr. Beadon's duty to take steps to prevent such charges being made for ships coming in with troops; that the rate of charge might otherwise increase from day to day with the increasing necessities of the Government; and added that if he left the matter to him, he would proceed to the Bankshall (the place of rendezvous for the Bengal pilots) and direct one of the officers to see the owners of the tug, and tell them that if they did not send down immediately an order to take the troops in tow, he would issue an order to the officers of the Pilot Service, strictly prohibiting them from allowing the *Underwriter* to take any ship in tow of which they had pilotage charge. To this Mr. Beadon answered, "I think you would do right;" and so left it with the defendant to dispose of the matter. What the defendant said he would do, he immediately did. The Government terms were still refused by the plaintiffs, and the service was unperformed by them. Whereupon, on the 22nd September, by the directions of the defendant, the order complained of was issued, and remained in force until the 19th October, when, by the direction of the Government, it was rescinded; and it is for the loss of employment during this interval that the action has been brought, and the damages awarded.

On this state of facts it does not appear to their Lordships material to consider whether the demand made on the part of the plaintiffs was exorbitant or not, nor whether the opinion expressed by the defendant, and on which he subsequently acted, was founded in good policy, or otherwise. Neither does it seem to them to conclude the question in the cause, that the act complained of is to be considered as the act of the Government, and that in the part which the defendant took in it he acted only as the officer of the Government, intending to discharge his duty as a public servant with perfect good faith, and with an entire absence of any malice, particular or general, against the plaintiffs. For, if the act which he did was in itself wrongful as against the plaintiffs and produced damage to them, they must have the same remedy by action against the doer, whether the act was his own, spontaneous and unauthorized, or whether it were done by the order of the superior power. The civil irresponsibility of the supreme power for tortious acts could not be maintained with any show of justice, if its agents were not personally responsible for them; in such cases the Government is morally bound to indemnify its agent, and it is hard on such agent when this obligation is not satisfied; but the right to compensation in the party injured is paramount to this consideration. Neither in the case of damage occasioned by a wrongful act, that is, an act which the law esteems an injury, is malice a necessary ingredient to the maintenance of the action: an imprisonment of the person, a battery, a trespass on land, are instances, and only instances, in which the act may be quite innocent, even laudable, as to the intention of the doer, and yet, if any damage, in legal contemplation, be the consequence, an action will lie.

But the foundation of every action of tort, apart from the question of malice, is an act wrongful, and which may be qualified legally as an injury. This position is not contravened in the very able and learned judgment of the Court below; indeed, it is assumed as the principle of decision, and the wrongful act relied on is stated to be, "the invasion of the right of the plaintiffs to employ their vessels in towage; in other words, the right of exercising their lawful trade for calling, without undue hindrance from others." No doubt an act which *primâ facie* would appear to be innocent and rightful, may become tortious if it invades the right of a third person. A familiar instance is, the erection on one's own land of anything which obstructs the light of a neighbour's house; *primâ facie* it is lawful to erect what one pleases on one's own land; but if by twenty years' enjoyment, the

neighbour has acquired the right to the unobstructed transmission of the light across that land, the erection of any building which substantially obstructs it, is an invasion of the right, and so not only does damage, but is unlawful and injurious.

The question then is whether, in this sense, the defendant has been guilty of a wrongful act. On the one hand, the Government has frequent occasion to have vessels towed up the river, and it desires to have this done by the owners of towing-vessels on certain terms which it believes to be just; and it keeps in its service a body of pilots, who have the charge of vessels coming up the river; and it is assumed that, practically, the discretion, for the time being, of employing the particular towing-vessel that is to bring up a ship, is vested in the pilot who has her in charge. The plaintiffs decline to deal with the Government on the terms which it desires to deal on, and in a particular case insist on what appears to the Government not only to be an unreasonable demand in itself, but likely, as a precedent, to be injurious to the public interests, if yielded to in this particular instance. If the plaintiffs have the right, as undoubtedly they have, of prescribing what terms they please for the services they are to render, it cannot be doubted that the Government has an equal right to accept or refuse to deal with the plaintiffs on those terms: to say, we will employ you only if you will accept such or such a remuneration. And if the prohibition complained of had been limited to pilots in charge of vessels in the Public Service, we suppose no one would have imagined for a moment that there was anything wrongful in it, or that any action could be maintained on account of it, however prejudicial its consequence might have been to the plaintiff's business; nor could it have made any difference if there were no vessels to be towed up but those in the service of the Government, although the consequence would have been directly a total loss of employment by the plaintiffs; for their right to exercise their calling must be understood only as co-extensive with, and not as over-riding, the right of the public or of individuals to deal with them or not, at its pleasure: the right to buy or to refuse to buy is as much to be regarded, as the right to sell or to refuse to sell.

But the prohibition certainly goes beyond this; it forbids the officers of the Pilot service from allowing the *Underwriter* to take *any* ship in tow, of which they have pilotage charge, and the question is whether this difference in extent makes it, as against the plaintiffs, wrongful. Their Lordships are of opinion that it does not. For the interests of the community, and without any legal obligation, the Government has organized a body of pilots; it does not appear that any law forbids the employment of a pilot who is not of that body, and indeed, it was proved that there were other pilots exercising their calling in the port of Calcutta, on whom the Government prohibition would have had no effect. The Government certainly, as any other master, may lawfully restrict its own servants as to those whom they shall employ under them, or co-operate with in performing the services for the due performance of which they are enrolled and taken into its service. Supposing it had been believed that the *Underwriter* was an ill-found vessel, or in any way unfit for the service, might not the pilots have been fully forbidden to employ her, until these objections were removed? Would it not, indeed, have been the duty of the Government to do so? And is it not equally lawful and right when it is honestly believed that her owners will only render their services on exorbitant terms? As regards individual owners of vessels, of all but those employed on its own account, the Government by its pilots co-operates with the plaintiffs in the service of bringing their vessels safely into port; may if not refuse that co-operation so long as it believes the demand made by them unreasonable and likely to be prejudical to its own interests, that is, the interests of the public? Their Lordships think this questions can admit of only one answer, and if so, the prohibition issued by the defendant in its whole extent was a lawful act, and did not interfere injuriously with any right of the plaintiffs.

It will be observed that their Lordships are only dealing with a case in which no malice in the most general sense of the term, is imputed or proved against the defendant. It is unnecessary to consider what would have been their judgment in a case in which the defendant had given the same advice to the Government, and done the same act towards the plaintiffs from any indirect motive, or with direct malice against them. It is enough to say that the decision of such a case would turn on totally different principles from the present.

It will be observed also that their Lordships' reasoning identifies the act of the defendant with the approbation of the Secretary to the Government: and they do this, not forgetting his letter to the defendant, dated on the 15th October, in which the defendant is censured for his act, and directed to re-call it; for their Lordships think that the evidence of the defendant, uncontradicted by the evidence of Mr. Beadon, clearly establishes that the defendant acted with his approbation. To him application had first been made for directions by the Captain of the *Belleisle*, and he sought advice of the defendant, accepted the advice which was given in good faith, and could not have been withheld without breach of duty, and, if so, the character of the act cannot be changed by the change of opinion subsequently manifested, or by the censure which it was thought right to inflict upon the agent.

This case was disposed of in the Court below in a very learned and elaborate judgment, to which their Lordships have given the full consideration it deserves, though they cannot accede to all the conclusions of that judgment. This appeal has also been very ably argued at the Bar; but their Lordships have not thought it necessary to review and distinguish the many cases cited, either in the judgment or the argument. It seems to them that, when the legal principle to which they have adverted are applied to the facts of this case, its decision turns on a very plain and elementary point: it is essential to an action in tort that the act complained of should, under the circumstances, be legally wrongful as regards the party complaining; that is, it must prejudicially affect him in some legal right; merely that it will, however directly, do him harm in his interests, is not enough. The cases are of daily occurence in which the lawful exercise of a right operates to the detriment of another, necessarily and directly, without being actionable. The present case appears to their Lordships to be no more; and they will, therefore, humbly advise Her Majesty that the judgment of the Court below ought to be reversed, and that the costs of the appeal should be borne by the respondents.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

The 29th March 1865.

Present:

Lord Kingsdown, Lord Justice Knight Bruce, Lord Justice Turner, Sir L. Peel, and Sir J. W. Colville.

Oude (Law of Dower)—Punjab Code.

On Appeal from the Court of the Judicial Commissioner of the Province of Oude.

Mulkah Do Alum Nawab Tajdar Bohoo, the widow and an heir of the late Secundur Hushmut General Sahib, a Mahomedan, deceased,

versus

Mirza Jehan Kudr, Nawab Mirxa Zuwan Ara Begum, and Rufootoonissa Begum,

According to the Punjab Code, (held to be in force in Oude in the years 1859 nnd 1860) the dower mentioned in marriage contract (instead of being enforced as an absolute deed, as claimed by the appellant) is subject to a modification at the discretion of the Court, both in the case of a divorce and of the death of the husband.

THIS is an appeal, by the widow of the late general Sahib, against certain decisions which have been pronounced by the Judicial Commissioner in Oude, on a claim preferred by her for dower against the estate of her late husband.

The marriage took place about the year 1838 of our Æra, and by the settlement made upon it to which the father of the bridegroom was a party, the wife's dower was fixed at a crore of rupees, a sum equal to 1,000,000l. sterling.

The father of the bridegroom was a son of the King of Oude, and at that time heir apparent to the throne.

General Sahib came over to England after the overthrow of the Oude Dynasty, and died here.

The Royal Family of Oude were all Mahomedans

The General left a son, an adopted son, and two daughters, surviving him. These persons claimed to be co-heirs with his widow to his property.

The widow claimed a right to have the whole amount secured by the deed as her dower treated as a debt due from her husband's estate, and paid *pari passu* with the debts of other creditors, and she disputed the titles of the other claimants as co-heirs.

After some attempts to settle the matter by arbitration which proved abortive, a suit was instituted in order to determine the rights of the parties.

In the course of these proceedings, an enquiry was directed with respect to the property which the General had left at his death; and, in the result, it appeared that it amounted in all to about 5 lacs of rupees. The claim of the appellant alone, in respect of her dower, amounted to a crore or 100 lacs, exclusive of other debts which are represented to be of very trifling amount.

The effect, therefore, of allowing the appellant's claim, would be to a great extent, to defeat the claims of the other creditors, and to sweep away the whole property from the heir.

If such, however, be her legal rights, no Court of Justice can refuse to give effect to them on the ground of any inconvenience or hardship, which may result from allowing them.

The case came first before two Assistant Commissioners in the Lucknow District Court, in August 1859; then, on appeal, before Colonel Abbott, the Commissioner Superintendant of the Lucknow division, on the 2nd December 1859; and lastly, before Mr. Campbell, the Judicial Commissioner of Oude, on the 23rd March 1860. All these gentlemen were of opinion that the claim of the appellant could not be allowed to its full extent, but must be modified with reference to the assets of the husband and the circumstances of his family; but they differed in some degree as to the mode in which, in the exercise of their discretion, the division between the widow and the other heirs should be made. By the last order, that of Mr. Campbell, made on the 3rd March 1860, it was directed that the debts of the General should be first paid; that one-half of the remaining property should be paid to the widow, and the other half to the other heirs, but this decision was not to affect a sum of 1,10,000 rupees in Company's paper in the name of the appellant, which was to be retained by her as her absolute property. From this and the preceding orders, the present appeal has been brought.

Great trouble appears to have been taken by the Commissioner to ascertain the general Mahomedan Law upon the subject; and opinions were obtained from the Courts of the several provinces of India, particularly with reference to the question whether, when extravagant sums, far beyond the means of the bridegroom to satisfy, were provided by settlement as dowers, such sums were to be treated as *bonâ fide* debts, to be paid *pari passu*, with other debts, on the death of the husband, though they might sweep away the whole property from the heirs; or whether they were to be treated as securities for an adequate provision for the wife. The reports from the different provinces were not uniform—some being in favor of treating the sum fixed as an absolute debt; others in favor of a modification of the demand with reference to what might be considered the proper dower of the woman.

It is not necessary, in the opinion of their Lordships, to decide the general question, because, whatever the general law may be, the mode in which contracts of this description are to be treated in Oude has been settled by specific Regulations issued by competent authority in the manner which we are about to state.

We take the facts as to the origin of these Regulations from a letter dated the 4th of February 1856, from the Secretary-General of the Indian Government, containing instructions for the Government of Oude, addressed to Major-General Outram, who was appointed Chief Commissioner of the affairs of this Province.

The facts, as appearing in this letter, are these: in the year 1847-48 a few rules for Civil Judicature were drawn out by the Indian Government for the guidance of the officers employed in the Cis and Trans-Sutlej States. Then these were in 1849 extended to the Punjab, and it was left to the Officers charged with the local administration, laying upon these the foundation of the judicial system, to improve, amend, and elaborate them, as practical experience might suggest.

These rules, thus amended, were, in 1854, reduced into a printed form, and circulated amongst the Judges of the Punjab. They are entitled "Abstract Principles of Law, circulated for the guidance of Officers employed in the Administration of Civil Justice in the Punjab; to which is appended a proposed Form of Procedure."

This Code, as its title imports, contains a statement—1. Of the principles of law to be adopted by the Judges; and 2. Of the rules of procedure to be followed. It lays down the ordinary rules of Mahomedan and Hindoo Law on the principal subjects which were likely to come before the Courts, and both in the rules of law and forms of procedure introduces some alterations into the laws prevailing in the older Provinces.

This Code, thus introduced into the Punjab, had, in the opinion of the Government, been found to work well.

In February 1856, the King of Oude was deposed by the Indian Government, and the whole administration, Civil and Military, of the Kingdom was assumed by its Officers under its authority. To provide for the administration of justice, a number of Commissioners and Assistant Commissioners were appointed to act for different districts into which the country was to be divided; and the general rules to be observed in the administration of justice, as well as in the ordering of the Province in other respects, are laid down in the letter to which we have referred.

The intention to assimilate, as far as possible, the Government of Oude to that of the Punjab, appears in several passages of the letter. In paragraph 21 it is said,—

"It has been already intimated to you that the administration of Oude is to be conducted as nearly as possible in conformity with the system which has been introduced into the Punjab."

After explaining the advantages which had arisen in that Province from the introduction of the New Code, and observing that the Kingdom of Oude resembled very close in its population, language, creeds, and customs, the North-West Provinces, the letter proceeds,—"There is, therefore, every reason to believe and none to doubt that the system of administration as modified for the Punjab and divested of all those forms and technicalities which delay justice, and are specially distasteful to a people unaccustomed to technical litigation, will be acceptable to the people of Oude, and more completely suited to the Province itself than it was to the Punjab; where, nevertheless, its success is undeniable.

After dealing with financial and some other matters, the letter, in paragraph 43, proceeds to give instructions for the administration of Civil justice, with respect to which it observes that very material assist-